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No. _____

In The

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,

Petitioner,

vs.

JANE DOE, Individually and as next friend for her minor children, Jane and John Doe, Minor Children; Jane Doe #2, Individually and as next friend for her minor child, John Doe, Minor Child, and John Doe, Individually,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

LEON KELLY FRELS*
**Counsel of Record*
LISA A. BROWN
REAGAN D. PRATT
BRACEWELL & PATTERSON, L.L.P.
711 Louisiana, Suite 2900
Houston, Texas 77002-2781
(713) 223-2900

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

(1) Does the Establishment Clause require public high schools to exclude religious content from student-initiated speech at a school function where non-religious student speech is permitted, or does such exclusion require viewpoint discrimination in violation of the Free Speech Clause?

(2) The court below held that the Petitioner must regulate the content of student-initiated invocations and benedictions at a high school graduation ceremony by directing students to keep their messages "non-sectarian" and "nonproselytizing."

Does a rule that requires high school officials to regulate student messages to ensure that they are "nonsectarian" and "nonproselytizing" violate First Amendment prohibitions against viewpoint discrimination and the establishment of religion?

LIST OF PARTIES

The Petitioner/Defendant is the Santa Fe Independent School District, a public school district located in Galveston County, Texas.

The Respondents/Plaintiffs are six individuals who are proceeding anonymously. Their true names have been listed on a separate document filed under seal with the Court.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 168 F.3d 806. (App. A & B.) The dissent from the court's denial of rehearing *en banc* is reported at 171 F.3d 1013. (App. C.) The only reported opinion of the district court concerned the Respondents' request to proceed anonymously, which is not at issue here. That order is reported at 933 F.Supp. 647. The relevant orders of the district court are unreported. (App. D & E.)

JURISDICTION

The court of appeals entered its judgment on February 26, 1999. (App. A.) The Petitioner timely moved for rehearing, which was denied on April 7, 1999. (App. C.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND SCHOOL BOARD POLICIES INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . . . " U.S. Const. amend. I.

Two school district policies are at issue. Their full text is contained in Appendices F and G.

STATEMENT OF THE CASE

I. Proceedings below

The Petitioner, Santa Fe Independent School District ("Santa Fe ISD" or "Petitioner"), is a public school district located in Galveston County, Texas. In their original complaint, the Respondents accused Santa Fe ISD of various violations of the Establishment Clause of the First Amendment, invoking the jurisdiction of the district court under 28 U.S.C. § 1331.

The questions presented here arise from the Respondents' complaints that two of Santa Fe ISD's policies permitted religious content in speech by students at certain school events. The first policy permitted a high school student, selected by the student body, to deliver any "message" or "invocation" over the public address system before home varsity football games, for the purpose of promoting good sportsmanship. (App. F.) The second policy allowed graduating seniors to select a student to deliver an "invocation" or "benediction" to solemnize their high school graduation ceremony. (App. G.)

Santa Fe ISD moved for summary judgment, which was granted in part and denied in part. (R. at 380.) The district court ruled that the two policies would be constitutional only if they contained language directing students to keep their messages "nonsectarian and nonproselytizing." (App. E. at E12.) The district court declared the current policies invalid and ordered the school district to effectuate two alternative "back-up" policies that the school board had previously adopted

which did contain a "nonsectarian and nonproselytizing" restriction.

With respect to Respondents' complaints concerning other alleged violations of the Establishment Clause, the district court in its summary judgment order ruled that certain violations had occurred in the past. After a bench trial, however, the district court determined that many of the Respondents' complaints related to isolated occurrences and were not attributable to an unconstitutional policy or custom of the school board as required for liability under 42 U.S.C. § 1983. *See Jane Doe et al. v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 813 (5th Cir. 1999) (App. A at A13; App. D at D14-D15). The court found that none of the individual plaintiffs had suffered any damages. The district court entered a final judgment denying any further relief to the plaintiffs. (R. 816-17.)

Both the school district and the plaintiffs appealed to the Court of Appeals for the Fifth Circuit. Over a vigorous dissent, a panel of the court held that both policies are unconstitutional as written. The court of appeals agreed with the trial court that the school district must instruct graduating seniors to keep their commencement remarks "nonsectarian and nonproselytizing." 168 F.3d at 816-17 (App. A. at A19). The court further held, however, that no student prayers are permitted at other school-sponsored functions and that Santa Fe ISD's football game student speech policy violated the Establishment Clause because it theoretically allowed prayer as one of the types of speech a student might deliver. *Id.* at 822-23 (App. A at A38).

The Petitioner timely sought rehearing. On April 7, 1999, the panel denied rehearing and, on a vote of 9-7, the full court denied rehearing *en banc*. (App. C.)

II. Relevant background facts

1. Policy permitting student speech at football games

Prior to this litigation, the school district did not maintain a written policy concerning student messages or invocations at varsity football games.[1] Early in this litigation, the trial court ordered Petitioner to establish a written policy on student speech at football games. (R. 39; R. 123.) In response, the school board adopted a written policy stating:

> The Board has chosen to permit students to deliver a brief *invocation and/or message* to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition. . . . The student volunteer who is selected by his or her classmates may decide what *message and/or invocation* to deliver, consistent with the goals and purposes of this policy.

[1] Prior to this litigation, students did deliver invocations over the loud speaker before home games, although not pursuant to any particular written policy. The parties stipulated that there were three to six home games each season.

(App. F, emphasis added.) The policy further set forth the procedure for students to decide whether they want such a pre-game message and, if so, who will deliver it.[2]

The Fifth Circuit held that this policy violates the Establishment Clause because it permits prayer at a school-sponsored athletic event before a "government-organized audience." 168 F.3d at 822-23 (App. A at A24). The dissent argued that the pre-game ceremony policy is constitutional because "it neutrally accommodates both religious and nonreligious speech in a limited public forum." *Id.* at 834 (Jolly, J., dissenting) (App. B at B28).

2. The high school graduation policy

When this litigation began in April 1995, Santa Fe ISD's written policy concerning commencement stated that the graduating senior class "[may] elect to choose student volunteers to deliver *nonsectarian, nonproselytizing* invocations and benedictions for the purpose of solemnizing their graduation ceremonies." (R. 343, emphasis added.) This policy directly tracked a policy that the Fifth Circuit had upheld in *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993) (*"Clear Creek II"*).

In July 1995, as part of its response to the district court's order that the school board clarify all of its speech

[2] There is no evidence in the record showing the content of any messages or invocations given before or after adoption of this policy. *See Jane Doe et al. v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 810 n.3 (5th Cir. 1999) (App. A at A4 n.3).

policies, the Santa Fe ISD school board amended the graduation policy and deleted the viewpoint-based "nonsectarian and nonproselytizing" restriction on student speeches. The July 1995 policy, however, provided that the former policy containing the restriction would be reinstituted if the district court disallowed the new policy.

The policy reviewed by the district court for facial constitutionality read in pertinent part:

> The Board has chosen to permit the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be a part of the graduation exercise. If so chosen, the class shall elect by secret ballot, from a list of student volunteers, students to deliver invocations and benedictions for the purpose of solemnizing their graduation ceremonies.

(App. G.) The election permitted by this policy is held outside the school day.

The Fifth Circuit held that student-initiated, student-delivered invocations and benedictions at a high school graduation are constitutional, but only if the school district instructs students to keep their messages "nonsectarian and nonproselytizing." The court accordingly held that Santa Fe ISD's primary policy was unconstitutional, but approved the "back-up" policy because it contained the nonsectarian/nonproselytizing restriction. 168 F.3d at 816 (App. A at A36).

The dissent argued that the July 1995 policy created a limited public forum, was appropriately neutral, and, thus, was facially constitutional. The dissent argued that

the panel majority's nonsectarian/nonproselytizing restriction directly conflicts with this Court's opinions in *Engel v. Vitale*[3] and *Lee v. Weisman*,[4] both of which disapproved the concept of a state-approved "civic" or "nonsectarian" prayer. The dissent observed that the government both improperly establishes a religion and engages in illegitimate viewpoint discrimination when it restricts sectarian speech and proselytizing religious speech, while embracing ecumenical religious speech. 168 F.3d at 825, 827 (Jolly, J., dissenting) (App. A at B3, B9, B23).

REASONS FOR GRANTING THE PETITION

I. This Petition presents important First Amendment questions that should be settled by this Court.

The Fifth Circuit's decision sets forth an extraordinary interpretation of the First Amendment and directly conflicts with the relevant decisions of this Court. First, by prohibiting religious content in voluntary student speech at most school functions, even when non-religious speech is permitted, the court below has required public school administrators to engage in official discrimination based on religious viewpoint. As shown below, this prohibition conflicts with several of this Court's recent decisions, which require the accommodation of religious speech in fora where non-religious speech is permitted. Second, by mandating (in the name of the Establishment

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[3] 370 U.S. 42, 82 S.Ct. 1261 (1962).

[4] 505 U.S. 577, 112 S.Ct. 2649 (1992).

Clause) that school officials dictate the content and fervor of student prayers at graduation through the imposition of a "nonsectarian and nonproselytizing" restriction, the court below has placed its stamp of approval on a form of official "civic" prayer, which this Court previously has condemned as the unlawful establishment of religion. These results led Judge Jolly to declare in dissent that "the majority's view transgresses the most fundamental First Amendment rights," resulting in a "free fall into the black pit of the constitutionally forbidden." *Id.* at 824 (App. B at B1).

The Fifth Circuit's ruling will unconstitutionally entangle government with religion by requiring public school officials to scrutinize and censor student messages for the possibility of religious content, to a degree to be determined only by future court supervision. Governmental inspection of speech for religious content creates a constitutional risk that this Court has characterized as outright dangerous. "The first danger to liberty lies in granting the State the power to examine [speech] to determine whether or not [it is] based on some ultimate idea and, if so, for the State to classify [it]." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 835, 115 S.Ct. 2510, 2520 (1995).

The questions presented are important. This Court has stated that "vital" First Amendment rights were at stake when a university discriminated against student publications based on religious viewpoint. *Id.* at 835, 115 S.Ct. at 2520. The issues presented by this case, where a federal court has banned religious expression from student speech at high school functions, are no less vital.

The questions presented are neither abstract nor unusual: they are facing courts and schools across the country on a regular basis. At least two other circuits have addressed these issues recently, with mixed results and little certainty. The Ninth Circuit originally reached the opposite conclusion of the Fifth, upholding a student message policy on neutral accommodation grounds, in *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832 (9th Cir. 1998). The court reasoned that the Constitution is not offended when a student, selected by purely neutral and secular criterion and given autonomy over the content of her message at a school assembly, has the option of making her message a prayer. *Id.* at 837-38. The *en banc* court, however, vacated this opinion as moot due to the graduation of the last student plaintiff. *Doe v. Madison Sch. Dist. No. 321*, No. 97-35642, 1999 WL 317050 (9th Cir., May 19, 1999).

The Eleventh Circuit currently has a student message policy under *en banc* review, a 2-1 panel having disagreed about the constitutionality of the policy in that case. The panel decision was issued on May 11, 1999, and was vacated three weeks later. *Adler v. Duval County Sch. Bd.*, 174 F.3d 1236, *vacated*, 1999 WL 354889 (11th Cir., June 3, 1999). The *Adler* panel rejected a school policy that permitted unrestricted student messages at the beginning and closing of a graduation ceremony, because it was possible that the student would give a prayer. The panel reasoned that speakers who use the school's platform and microphone are "state actors" and that their messages necessarily are attributable to the state.

These developments and the Fifth Circuit's divided vote *en banc*, along with other recent decisions on student

religious speech on campus,[5] demonstrate the divisiveness of the questions presented and the importance of the subject matter to citizens in all parts of the country. Further litigation is inevitable given the intensity of public interest in these issues and given the line-drawing that is the hallmark of Establishment Clause analysis.

At a minimum, the decision below and the Eleventh Circuit's now-vacated *Adler* decision demonstrate the need for guidance from this Court on whether government suppression of religious speech by high school students is constitutionally required or, to the contrary, constitutionally forbidden. If the approach taken by the Fifth Circuit and the *Adler* panel is incorrect, then this Court should end this line of jurisprudence. If, however, these circuits are correct that neutral accommodation is forbidden in a secondary school environment, then this Court should provide guidance to school districts on the extent of their constitutional duty to censor religious content from student speech.

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[5] *See, e.g., Chaudhuri v. State of Tennessee*, 130 F.3d 232 (6th Cir. 1997) (upholding university policy permitting "nonsectarian" prayer at graduation); *ACLU v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (rejecting policy permitting student-delivered prayer at graduation); *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447 (9th Cir. 1994) (rejecting policy permitting student-delivered prayer at graduation), *cert. granted and decision vacated as moot*, 515 U.S. 1154 (1995).

II. The Fifth Circuit's requirement that school districts impose rules that exclude the possibility of student religious speech at high school functions conflicts with this Court's First Amendment precedents.

A. Excluding student religious speech from a forum where non-religious speech is permitted violates the Free Speech Clause.

This Court has recognized that religious speech is as "fully protected under the Free Speech Clause as secular private expression." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760, 115 S.Ct. 2440, 2446 (1995) (plurality). Accordingly, this Court has held that schools may not use the Establishment Clause as a vehicle for refusing to accommodate religious viewpoints. *See, e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395-96, 113 S.Ct. 2141, 2148-49 (1993) (concluding that Establishment Clause concerns will not justify discrimination against religious speech absent "realistic danger" that community will view challenged practice as endorsement of religion). Despite these recent decisions, the Fifth Circuit effectively ruled here that schools henceforth must affirmatively exclude all student religious speech from most school assemblies, regardless of whether non-religious speech is otherwise permitted.

Under Santa Fe ISD's pre-game student message policy, prayer is simply one type of speech permitted. On its face, the policy allows a student, selected by the student body, to deliver *any* "message" or "invocation" before home varsity high school football games, to promote good sportsmanship and create an appropriate environment for the competition. The written policy does not

mention "prayer," much less require or otherwise encourage it. The policy explicitly divorces school officials from the decision-making process as to whether any messages – religious or not – will be delivered. The policy grants the selected student broad discretion concerning the content of the message he or she gives, requiring only that the message be consistent with the stated secular goals of the policy. The language of the policy plainly provides a forum for non-religious messages, as well as implicitly permitting religious invocations.[6]

The speech permitted under the football policy is analogous to the speech of a valedictorian or salutatorian during a graduation ceremony. As Justice Souter wrote in a concurring opinion in *Lee v. Weisman*:

> If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State.

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[6] This conclusion is true without even addressing the court of appeals' erroneous assumption that the terms "invocation" and "benediction" necessarily mean "prayer." As recognized by Judge Jolly's dissent, the dictionary definition cited by the majority does not require an interpretation grounded in religion. *See Webster's Third International Dictionary* at 1190 (1993) (defining "invocation" as "the action or an act of petitioning for help or support"); *see also Webster's Ninth New Collegiate Dictionary* at 143 (1989) (defining "benediction" to mean "1: an expression of good wishes"); *Clear Creek II*, 977 F.2d at 969 (interpreting the term "invocation" to be free of religious content). Under Petitioner's policies, students remain free to craft a variety of solemnizing statements, to quote great philosophers, to read a poem – or to forego any solemnizing moment whatsoever.

505 U.S. 577, 630 n.8, 112 S.Ct. 2649, 2678 n.8 (1992) (Souter, J., concurring).

Nonetheless, despite the facial neutrality of the school district's pre-game message policy, the Fifth Circuit characterized it as a "prayer policy" and concluded that the Establishment Clause requires schools to exclude student religious speech from the forum. The court apparently discovered an Establishment Clause problem with the policy solely through the *possibility* that a selected student's message *might* be a prayer.

The panel's holding logically requires the suppression of religious viewpoints by speakers at all school-sponsored assemblies, not just athletic events.[7] Under the panel's decision, so long as the school district owns the microphone and the podium, it may not permit student speakers at an athletics banquet, prom night program, honor society ceremony, or student council assembly to include religion in the subject matter of their speech. The logic and reasoning of the Fifth Circuit's decision will require that school officials "prevent any speaker, including speakers as diverse as athletes, politicians, academics, entertainers, maybe even judges, from discussing a religious topic or invoking the Lord's name, to ensure that no audience member perceives that the school is endorsing the speaker's religious message." *Adler v. Duval County Sch. Bd.*, 174 F.3d 1236 (11th Cir. 1999) (Marcus, J., dissenting).

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[7] The court below held that a policy permitting invocations "cannot survive" outside the context "of the singularly serious nature of a graduation ceremony." 168 F.3d at 823 (App. A at A38).

The Fifth Circuit's categorical rejection of religious speech directly collides with the neutral accommodation principle advanced by this Court in *Lamb's Chapel*, *Rosenberger*,[8] and *Pinette*.[9] In *Lamb's Chapel*, the Court held that a school district violated the First Amendment when it excluded a religious group from a forum open to non-religious groups. *See* 508 U.S. at 395-96, 113 S.Ct. at 2148-49. The Court found "no realistic danger that the community would think that the District was endorsing religion or any particular creed" by allowing equal access to religious groups. *Id.*

Lamb's Chapel teaches that a school district, having created a forum for non-religious messages, is not permitted (much less required) to suppress all possibility that a speaker's message might have religious content. *Lamb's Chapel* followed this Court's earlier decision in *Widmar v. Vincent*,[10] which held that a university could not exclude student religious clubs from using college facilities that were open to non-religious student clubs.

More recently, in *Rosenberger*, the Court concluded that a public university had engaged in unconstitutional viewpoint discrimination when the university provided student activity funds to all student journals except those with religious content. The Court rejected the university's plea that it wished to avoid the impression that it supported religion. The "guarantee of neutrality is respected,

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[8] *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 831, 115 S.Ct. 2510, 2517 (1995).

[9] *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760, 115 S.Ct. 2440, 2446 (1995) (plurality).

[10] 454 U.S. 263, 102 S.Ct. 269 (1981).

not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 839, 115 S.Ct. 2510, 2521 (1995). The decision followed the long-standing principle that the Constitution does not require government "to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." *Zorach v. Clauson*, 343 U.S. 306, 312, 72 S.Ct. 679, 683 (1952); *see also Lee v. Weisman*, 505 U.S. 577, 598, 112 S.Ct. 2649, 2649 (1992) (recognizing that a "relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution"); *Everson v. Bd. of Educ.*, 330 U.S. 1, 18, 67 S.Ct. 504 (1947) ("State power is no more to be used so as to handicap religions, than it is to favor them.").

The decision below is openly hostile to *Rosenberger's* "guarantee of neutrality." Contrary to this Court's precedents, the Fifth Circuit concluded that government somehow endorses what it does not censor. This Court has explicitly rejected such reasoning, stating:

> [T]here is a crucial distinction between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. *We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support [religious] student speech that it merely permits on a nondiscriminatory basis.*

Bd. of Educ. v. Mergens, 496 U.S. 226, 250, 110 S.Ct. 2356, 2372 (1990) (emphasis added).[11]

Moreover, the ruling below will require public school officials to engage in the impossible and constitutionally offensive task of reviewing and censoring student speech for religious overtones. The constitutional infirmity of such a mandate was explored in *Rosenberger*, where this Court observed that, were it to fashion a rule requiring the *exclusion* of religious student journals from the school's funding program:

> [Such a law] would require the University "to scrutinize the content of student speech, lest the expression in question – speech otherwise protected by the Constitution – contain too great a religious content . . . That eventuality raises the specter of governmental censorship, to ensure that all student writings and publications meet some baseline standard of secular orthodoxy. To impose that standard on student speech at a university is to imperil the very sources of free speech and expression.

Rosenberger, 515 U.S. at 844, 115 S.Ct. at 2524; *see also Adler v. Duval County Sch. Bd.*, 174 F.3d 1236 (11th Cir. 1999) (Marcus, J., dissenting) (objecting to majority's rule requiring "eradication" of religious speech from student messages, in part because it leaves school officials "with

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[11] The trial testimony in this case proved the wisdom of the Court's observation in *Mergens*. The only high-school-aged plaintiff to testify at trial, Janie Doe, testified that she understood that the religious messages at the 1994 graduation were given by students and that the content of those messages had not been dictated by the school district. (R. Vol. 7, p. 71.)

the unenviable task of identifying the religious content in student speeches for excision").

Finally, the Fifth Circuit has created what amounts to a *per se* rule against student religious speech at school functions and assemblies. This Court, however, has "uniformly rejected" as too "simplistic" such an "absolutist approach" in Establishment Clause cases. *See Lynch v. Donnelly*, 465 U.S. 668, 678, 104 S.Ct. 1355, 1361 (1984). Rather, "[i]n each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed." *Id.* The Fifth Circuit accordingly erred when it categorically banned student religious speech at high school events without individualized consideration of the actual likelihood that any reasonable observer would perceive that the state has established or endorsed religion by permitting a student speaker to deliver a message of her own choosing.

B. Permitting students to deliver religious speech in a forum where non-religious speech is allowed does not offend the Establishment Clause.

Contrary to the opinion of the panel below, the school district's pre-game student message policy is constitutionally sound under all of the various Establishment Clause tests used by the Court.

"Coercion" test. In *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649 (1992), the school principal invited a rabbi to deliver a prayer at a middle school graduation and directed him to keep his prayers nonsectarian. The Court found that this practice offended the Establishment Clause because it involved *"state officials directing* the

performance of a *formal religious exercise* at promotional and graduation ceremonies for secondary schools," thereby coercing participation by objectors. 505 U.S. at 588, 112 S.Ct. at 2655 (emphasis added).

In contrast to the policy at issue in *Lee*, Santa Fe ISD's student message policy *prohibits* school officials from directing students to make a speech, and it prohibits school officials from controlling the content of student speech if the students choose to take advantage of the opportunity offered. If the student body chooses to have a speaker, the student-selected student speaker is given complete control over the content of her message, subject to the stated goals of the policy. The policy neither requires nor prohibits a religious message. The school board "has neither scripted, supervised, endorsed, suggested, nor edited these personal viewpoints." 168 F.3d at 836 (Jolly, J., dissenting) (App. B at B31).

The *Lee* court also expressed concern about the psychological pressure to participate in a religious activity that would be placed upon students by government-mandated prayer. *Lee*, 505 U.S. at 593, 112 S.Ct. at 2658. The student message policy here alters this dynamic. *See Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 971 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993). Because any message during the pre-game ceremony is student-initiated, student-composed, and student-delivered, the specter of a government-approved authority figure that coerces participation is non-existent. In this age of mass media and the Internet, today's high school students are mature enough to appreciate the difference between student

speech and government speech, as this Court acknowledged in *Mergens*. And the principle of neutral accommodation in the high school arena is fully consistent with *Lee*, wherein the Court recognized that, "at graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students." *Lee*, 505 U.S. at 598-99, 112 S.Ct. at 2649. "*Lee* calls for the difficult task of separating a student's private message, which may be religious in character, from the school board's religious speech, protecting the former and prohibiting the latter." *Adler v. Duval County Sch. Bd.*, 174 F.3d 1236 (11th Cir. 1999) (Marcus, J., dissenting).

***"Lemon"* test.** Under the *Lemon* test, a government practice is unconstitutional if it lacks a secular purpose; its primary effect is either to advance or inhibit religion; and it excessively entangles government with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105 (1971). The secular purpose prong focuses on the *predominant* purpose of the challenged rule; an incidental benefit to religion will not invalidate a rule. *See Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S.Ct. 2479, 2489 (1985); *Lynch v. Donnelly*, 465 U.S. 668, 678, 104 S.Ct. 1355, 1361-62 (1984).

In this case, the court of appeals held that the football policy was devoid of a secular purpose. While the desire to solemnize a *graduation* may serve a secular purpose, the court wrote, football games "are hardly the sober type of event" worthy of solemnization. *See* 168 F.3d at 823 (App. A at A38). Easy examples, however, defy the court's conclusion: the pageantry of the Olympics' opening ceremonies, the singing of the National Anthem

before every NBA basketball game, the ceremonial remarks that precede the Special Olympics. As noted by the dissent, "[a]t sporting events, messages and/or invocations can promote, among other things, honest and fair play, clean competition, individual challenge to be one's best, importance of team work. . . . " *Id.* at 835 (Jolly, J., dissenting) (App. B at B29). The pre-game speech also is an opportunity to encourage good sportsmanship and communicate good wishes to the students and parents in the stands.

The primary effect of the school district's football ceremony policy neither advances nor inhibits religion, because the policy is neutral with regard to the content of any statement or invocation that may be given. "To have forbidden 'effects' under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities and influence." *Corporation of Presiding Bishop of the Church of Jesus Christ v. Amos*, 483 U.S. 327, 107 S.Ct. 2862, 2869 (1987). The government does not actively advance religion by neutrally permitting its citizens to publicly express religious sentiments.

Finally, the football message policy does not call for the school's "excessive entanglement" with religion because the school district has overtly divorced itself from the decisions whether a message will be given and, if so, what type of message it will be.

"Endorsement" test. The endorsement test seeks to determine whether the government endorses religion by means of the challenged action. *See County of Allegheny v. ACLU*, 492 U.S. 573, 109 S.Ct. 3086 (1989). The state unconstitutionally endorses religion when it conveys a

message that a particular religion is "favored," "preferred," or "promoted" over other beliefs. *Id.* at 593, 109 S.Ct. at 3101. Endorsement does not occur, however, merely because of the possibility that someone might erroneously conclude that the state is endorsing religion. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 763, 765, 115 S.Ct. 2440, 2448 (1995) (Scalia, J., plurality opinion). Rather, "the endorsement test necessarily focuses upon the perception of a reasonable, informed observer" and not that of a casual passerby. *Id.* at 773, 780, 115 S.Ct. at 2452, 2455 (O'Connor, J. concurring).

The panel majority below nonetheless concluded that a policy that "permits" religious speech "undoubtedly conveys" approval of religion. *See* 168 F.3d at 817-18 (App. A at A24). This conclusion directly contradicts this Court's admonishment in *Mergens* that "a school does not endorse or support [religious] student speech that it merely permits on a nondiscriminatory basis." *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250, 110 S.Ct. 2356, 2372 (1990). No state endorsement exists here because the school merely permits speech on a nondiscriminatory basis. Moreover, by limiting the policy to a high school event, the policy is aimed at persons with the maturity to realize that the message given is, in fact, that of a student and not that of the state.

In conclusion, excluding religious speech from the categories of speech permitted by the message policy is not required by the Establishment Clause and, instead, violates the Free Speech Clause. This Court should grant this petition and reverse the Fifth Circuit's contrary holdings.

III. The Fifth Circuit's requirement that student-delivered invocations and benedictions at a high school graduation be "nonsectarian and nonproselytizing" will result in illegal viewpoint discrimination and the impermissible establishment of a "civic" religion.

The circuit court's decision that student prayers at graduation must be "nonsectarian and nonproselytizing" not only directly contradicts controlling Supreme Court precedent, it "achieves the jurisprudentially rare result of offending not only one, but three provisions within the First Amendment."[12] 168 F.3d at 825 (Jolly, J., dissenting) (App. B at B3-B4).

The majority's holding conflicts with *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649 (1992), and *Engel v. Vitale*, 370 U.S. 421, 430, 82 S.Ct. 1261, 1266-67 (1962). In *Lee*, this Court explicitly disapproved of a school's practice of directing a visiting clergyman to deliver a "nonsectarian" prayer at a school event. The Court observed that, by advising the cleric to deliver a "nonsectarian" prayer, the school principal had "directed and controlled the content of the prayers." 505 U.S. at 588, 112 S.Ct. at 2656. The court held that this control itself resulted in an impermissible establishment of a "civic" religion:

> We are asked to recognize the existence of a practice of nonsectarian prayer. . . . There may be some support [for the statement] that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not. . . . [However, the] suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.

[12] Judge Jolly identified the Establishment Clause, the Free Speech Clause, and the Free Exercise Clause. *See* 168 F.3d at 825 (Jolly, J., dissenting) (App. B at B4 n.5).

Id. at 589-90, 112 S.Ct. at 2656-57.

In *Engel v. Vitale*, the Court wrote that "the fact that the prayer may be denominationally neutral" does not "free it from the limitations of the establishment clause." 370 U.S. at 430, 82 S.Ct. at 1266-67. A public school is prohibited from "placing its official stamp of approval upon one particular kind of prayer." *Id.* at 429, 82 S.Ct. at 1266; *see also Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 279 (5th Cir.) (criticizing nonsectarian/nonproselytizing restriction in a school prayer statute because it "will inevitably involve school officials in determining which prayers are 'nonsectarian and nonproselytizing' "), *cert. denied sub nom. Moore v. Ingebretsen*, 519 U.S. 965 (1996).

The Fifth Circuit has nonetheless placed its "official stamp of approval upon one particular kind of prayer" – those that are nonsectarian and nonproseltyzing. By doing so, the panel has directed the school district to establish an official or civic "nonsectarian" religion in the precise manner and for the precise purpose that the *Lee* and *Engel* courts ruled constitutionally forbidden.

The panel's decision to control the content of citizens' prayers also conflicts with this Court's decisions protecting students' liberties of free expression and free exercise of religion, liberties guaranteed by the same constitutional provision which the panel purported to defend. As

discussed above, the government may not use the Establishment Clause to avoid its responsibility to neutrally accommodate religious viewpoints. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94, 113 S.Ct. 2141, 2147-48 (1993). Indeed, the Court has recognized that religious speech is one of the core types of speech protected by the First Amendment:

> [G]overnment suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince. Accordingly, we have not excluded from free speech protection religious proselytizing, or even acts of worship.

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760, 115 S.Ct. 2440, 2446 (1995) (plurality).

Even in the public school context, the Court has required schools to balance the competing mandates of the Establishment and Free Speech clauses by neutrally accommodating religion, neither favoring it nor discriminating against it. *See generally Bd. of Educ. v. Mergens*, 496 U.S. 226, 250, 110 S.Ct. 2356, 2372 (1990) (concluding that the Free Speech and Free Exercise Clauses protect religious speech by secondary school students, and a school does not violate the Establishment Clause by permitting such speech on a nondiscriminatory basis); *Lamb's Chapel*, 508 U.S. at 392-93, 113 S.Ct. at 2147 (declaring that public school may not deny access to facilities based upon religious viewpoint).

The Fifth Circuit attempted to avoid this rule by reasoning that the school district had not created a "public forum" for speech at graduation and, therefore, could

not respect the free speech and free exercise rights of its student speakers. Even if the panel's classification of the forum were correct, however, the panel's holding contradicts well-established law. The state may not engage in viewpoint discrimination even in non-public fora. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 103 S.Ct. 948, 955 (1983). While control over access to a non-public forum can be based on subject matter and speaker identity, the distinctions drawn must still be "viewpoint neutral." *See Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 787, 806, 105 S.Ct. 3439, 3451 (1985).

This Court expressly adhered to this principle in *Lamb's Chapel*. In holding that the First Amendment prohibited a school from discriminating against a speaker based upon its religious perspective, the Court engaged in no analysis of what type of forum had been created. *See* 508 U.S. at 391-92, 113 S.Ct. at 2147 ("We need not rule on this issue."). Rather, the Court held that the exclusion of a group based on its religious viewpoint would be "plainly invalid" even in the context of a non-public forum . . .

> under our holding in *Cornelius* that "[a]lthough a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers for whose especial benefit the forum was created . . . the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."

Id. at 394, 113 S.Ct. at 2147 (alterations in original) (citations omitted).

Likewise, even if Santa Fe ISD's graduation policy creates a non-public forum only for invocations, the school district would violate the First Amendment if it attempted to suppress sectarian invocations in favor of ecumenical or non-religious invocations.[13] "When the government restricts sectarian and proseltyzing speech, while embracing ecumenical religious speech, the government has engaged in illegitimate, viewpoint discrimination." 168 F.3d at 825 (Jolly, J., dissenting) (App. B at B3); *see also ACLU v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1492 (3d Cir. 1996) (Mansmann, J., dissenting) (finding a graduation prayer policy that did not prohibit sectarian prayer more defensible than one limited to non-sectarian prayers because it "comports with the First Amendment's prohibition against the inhibition of the practice of religion or of free expression, while at the same time precludes even the remote possibility of an establishment of religion by virtue of its uncompromising neutrality").

This Court's "consistent interpretation of the Establishment Clause allows no exception for the nonsectarian and nonproselytizing prayer." 168 F.3d at 827 (Jolly, J., dissenting) (App. B at B9). "[I]t denies government the

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[13] The panel majority acknowledged that review of student prayers "for sectarianism and proselytization" would "*undoubtedly* constitute impermissible viewpoint discrimination," provided that "the students' graduation prayers constituted purely private speech." 168 F.3d at 822 n.12 (App. A at A35 n.12) (emphasis added).

ability to favor a composite ecumenical religion just as surely as it denies the ability to favor one of its components." *Id.* This Court should grant review of the decision below and consider whether the Constitution's mandates under the Establishment, Free Exercise, and Free Speech clauses are better honored through the neutral accommodation of student viewpoints, whether they be sectarian, ecumenical, or religion-free, rather than through government censorship of the content of student prayers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LEON KELLY FRELS*
*Counsel of Record
LISA A. BROWN
REAGAN D. PRATT
BRACEWELL & PATTERSON, L.L.P.
711 Louisiana, Suite 2900
Houston, Texas 77002-2781
(713) 223-2900

Attorneys for Petitioner

DATED: July 2, 1999

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-40150

JANE DOE, Individually and as next of friend for her minor children,
Jane and John Doe, Minor Children;
JANE DOE #2, Individually and as next of friend for her minor child,
John Doe, Minor Child, and John Doe, Individually,

Plaintiffs-Appellees-Cross Appellants,

versus

SANTA FE INDEPENDENT SCHOOL DISTRICT, ET AL.,

Defendants,

SANTA FE INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellant-Cross Appellee.

Appeals from the United States District Court
for the Southern District of Texas

Before JOLLY, WIENER, and STEWART, Circuit Judges.

WIENER, Circuit Judge:

In *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992) (*Clear Creek II*), we declared Clear

Creek's policy of allowing a student-selected, student-given, nonsectarian, nonproselytizing invocation and benediction at high school graduations ("Clear Creek Prayer Policy") not violative of the Establishment Clause of the First Amendment to the United States Constitution. The primary questions posed by this case are: (1) whether the constitutionality of a Clear Creek Prayer Policy depends on its "nonsectarian, nonproselytizing," features, and (2) whether the venue of a Clear Creek Prayer Policy may be extended to high school football games without violating the applicable provisions of the Constitution of the United States. For the reasons that follow, we hold that (1) a public school prayer policy that, unlike a Clear Creek Prayer Policy, permits sectarian, proselytizing benedictions and invocations cannot pass constitutional muster, and (2) extending a Clear Creek Prayer Policy to cover messages delivered before a high school football games violates the Constitution even if such a policy includes the "nonsectarian, nonproselytizing" restrictions.

I

FACTS AND PROCEEDINGS

Santa Fe Independent School District ("SFISD") is a political subdivision of the State of Texas, and is governed by an elected, seven-person Board of Trustees. As its name suggests, SFISD is responsible for overseeing the public educational programs and facilities of a small community in south Texas. In performing this role, SFISD supervises over 4,000 students each of whom attends one of five schools, two primary schools, one intermediate

school, one junior high school, and one high school. The plaintiffs in this action (the "Does") are several children currently or formerly enrolled in SFISD schools and their parents. In light of the sensitive nature of the action, they have been allowed to proceed anonymously.[1]

For some time prior to the onset of this litigation, the Does believed that SFISD was pursuing policies that were in contravention of the Establishment Clause. The evidence that the Does were able to accumulate covered a wide variety of disturbing incidents and practices, but for purposes of illustration we focus on the following two items.[2]

First, in April 1993, while plaintiff Jane Doe II was attending her seventh grade Texas History class, her teacher, David Wilson, handed out fliers advertising a Baptist religious revival. Jane Doe II asked if non-Baptists were invited to attend, prompting Wilson to inquire about her religious affiliation. On hearing that she was an

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[1] A decision, we might add, that many SFISD officials apparently neither agreed with nor particularly respected. Attempts by SFISD administrators, teachers, and other employees "overtly or covertly to ferret out the identities of the Plaintiffs . . . by means of bogus petitions, questionnaires, individual interrogation, or downright 'snooping' " eventually prompted the district court to threaten to visit upon them "THE HARSHEST POSSIBLE CONTEMPT SANCTIONS" and/or "CRIMINAL LIABILITY" (emphasis in original) if they did not cease their investigations.

[2] Our recitation of the evidence, including the pseudonyms used for specific anonymous plaintiffs, is taken principally from the joint stipulations of the parties. References to "SFISD" include the Board of Trustees, the superintendent, and other responsible administrative officials as appropriate.

adherent of the Church of Jesus Christ of Latter Day Saints (Mormon), Wilson launched into a diatribe about the non-Christian, cult-like nature of Mormonism, and its general evils. Wilson's comments inspired further discussion among Jane Doe II's classmates, some of whom reportedly noted that "[h]e sure does make it sound evil," and "[g]ee, . . . it's kind of like the KKK, isn't it?" Jane Doe II was understandably upset by this incident, and two days later, her mother, Jane Doe I, complained to SFISD. Because Wilson's actions were concededly contrary to written SFISD policies barring the distribution of religious literature in class or the verbal abuse of any student, he was given a written reprimand and directed to apologize to the Does and to his class.

Second, and of greatest significance to this case, for an undisclosed period of time leading up to and including the 1992-93 and 1993-94 school years, SFISD allowed students to read overtly Christian prayers from the stage at graduation ceremonies and over the public address system at home football games.[3] The prayers were

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[3] For example:

1994 Graduation Invocation

Please bow your heads. Dear heavenly Father: Thank you for allowing us to gather here safely. We thank you for the wonderful year you have allowed us to spend together as students of Santa Fe. We thank you for our teachers who have devoted many hours to each of us. Thank you Lord for our parents and may each one receive a special blessing. We pray also for a blessing and guidance as each student moves forward

delivered as "invocations" or "benedictions" for these events, and typically were given by officers of the student council.[4] Of course, SFISD maintained complete control

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in the future. Lord, bless this ceremony and give us all a safe journey home. In Jesus's name we pray.

1994 Graduation Benediction

Our most gracious heavenly Father: We thank you for bringing us to this, our graduation. We ask you to be with us as we start a new beginning to our lives. Father: We express our gratitude to all that have helped us over the past three years. Especially do we thank our parents, teachers, and friends who encouraged us, counseled us, and always extended a helping hand when needed. Please see us safely through this night and the tomorrows of our lives. In Jesus's name, Amen.

The record contains no examples of the football game prayers, but we may assume for purposes of this opinion that they were similar in content. As a bit of further background, it is interesting to note that the closing paragraph of the salutatory address at the 1994 graduation was actually more proselytizing than the invocation and benediction:

> . . . There is only one thing which we as Christians can truly rely [on]: the faithfulness and strength of a loving God. It is now that each of us must stand on a solid rock of Jesus Christ, stand up for those things on which we believe. Even if it is alone that we must stand. We, having done all, must continue to stand in faith remembering that Christ would have suffered and died for only one of us. So we begin the journey of life, not a life of mediocrity and compromise, but the possible life which Christ has promised, a life of abundance and joy, being confident of this very thing, that he who has begun a good work in you will complete it until the day of Jesus Christ. Thank You.

[4] In the case of the football games, the prayers were given by the student council "chaplain," a position created by the

over the programs and facilities during the reading of the prayers, including the ability to mute the microphone or remove the speaker. Furthermore, the text of the graduation invocations and benedictions was screened by SFISD for content prior to the ceremony.

With regard to the football games, it is undisputed that no written policy governing the invocations existed prior to the onset of litigation in this case. With regard to graduation, SFISD did draft a written policy (the "June Policy"), but only in time for the 1994 ceremony. It read as follows:

> The Board shall not permit clergymen to deliver invocations or benedictions at promotional and graduation ceremonies for secondary schools; nor shall school officials direct the performance of a formal religious exercise at such ceremonies. *Lee et al. v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) [See also EMI]
>
> Dated June 17, 1993

After the 1994 graduation ceremony, but before the onset of the instant litigation, SFISD amended its graduation policy (the "October Policy") to reflect more closely its interpretation of our decision in *Clear Creek II*:

> The Board shall not permit clergymen to deliver invocations or benedictions at promotional and graduation ceremonies for secondary schools; nor shall school officials direct the performance of a formal religious exercise at such ceremonies. *Lee et al. v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) [See also EMI (LEGAL)]
>
> The Board *may permit* the graduating senior class(es), with the advice and counsel of the senior class sponsor, to elect to choose student volunteers to deliver *nonsectarian, nonproselytizing invocations and benedictions* for the purpose of solemnizing their graduation ceremonies. *Jones v. Clear Creek ISD*, 977 F.2d 963 (5th Cir. 1992), cert. denied, 508 U.S. 967, 113 S.Ct. 2950, 124 L.Ed.2d 697 (1993).
>
> Dated October 20, 1994

In April 1995, the Does filed suit against SFISD in the Federal District Court for the Southern District of Texas.[5] Citing the instances described above and others, they alleged that SFISD maintains policies and practices in violation of the Establishment Clause. They demanded prospective injunctive and declaratory relief in addition to money damages under 42 U.S.C. § 1983.

In the following month, acting in response to the Does' motion for a temporary restraining order regarding the imminent 1995 graduation ceremonies, the district court ruled that, consistent with SFISD's October Policy and our decision in *Clear Creek II*, student-selected, student-given, nonsectarian, nonproselytizing invocations

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student-written constitution and elected by students. It appears that at graduation the student council president customarily gave the invocation, and the secretary customarily gave the benediction.

[5] The Does also sued several members of SFISD's Board of Trustees and administrators in their individual capacities, but all of these defendants were dismissed in the early stages of the case.

and benedictions would be permitted, and that such invocations and benedictions could take the form of a "non-denominational prayer." Although cautioning that SFISD should play no role in selecting the students or scrutinizing and approving the content of the invocations and benedictions, the district court went on to note gratuitously that "generic prayers to the 'Almighty', or to 'God', or to 'Our Heavenly Father (or Mother)', or the like, will of course be permitted. *Reference to any particular deity, by name, such as Mohammed, Jesus, Buddha, or the like, will likewise be permitted,* as long as the general thrust of the prayer is non-proselytizing, as required by [*Clear Creek II*]."[6] In anticipation of addressing the central issues of the case, the trial court also admonished that SFISD would in due course be directed to clarify a number of its Establishment Clause policies, and, in particular, "to establish or to clarify existing policies to deal with either banning all prayer, or firmly establishing reasonable guidelines to allow nonsectarian and non-proselytizing prayer at all relevant school functions."

As an initial and, by its own admission, "emergency" response to the court's order, prior to the 1995 graduation, SFISD made a few changes (the "May Policy") to its pre-litigation October Policy:

> The Board *has chosen to permit* the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be a part of the graduation exercise. If so chosen the class shall elect by

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[6] Emphasis added.

> secret ballot, from a list of student volunteers, students to deliver *nonsectarian, nonproselytizing invocations and benedictions* for the purpose of solemnizing their graduation ceremonies. *Jones v. Clear Creek ISD*, 977 F.2d 963 (5th Cir. 1992) cert. denied 508 U.S. 967, 113 S.Ct. 2950, 124 L.Ed.2d 697 (1993).
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> Dated May 23, 1995

By July, SFISD apparently had a chance to conduct a more thorough review of its fundamental position on graduation invocations and benedictions. At this point, the May Policy was superseded by a new and, for purposes of this appeal, final version (the "July Policy"):

> The Board *has chosen to permit* the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be a part of the graduation exercise. If so chosen, the class shall elect by secret ballot, from a list of student volunteers, students to deliver *invocations and benedictions* for the purpose of solemnizing their graduation ceremonies.
>
> *If the District is enjoined by court order from the enforcement of this policy, then and only then will the following policy automatically become the applicable policy of the school district.*
>
> The Board *has chosen to permit* the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be a part of the graduation exercise. If so chosen, the class shall elect

> by secret ballot, from a list of student volunteers, students to deliver *nonsectarian, nonproselytizing invocations and benedictions* for the purpose of solemnizing their graduation ceremonies.
>
> Dated July 24, 1995

As SFISD readily admits, the fact that the initial paragraph of this final graduation prayer policy intentionally removes the words "nonsectarian, nonproselytizing" constitutes an additional and very substantial deviation from both *Clear Creek II* and SFISD's October and May Policies. Indeed, it is this deviation that ultimately forms the core of the issues before us today.

Less than two weeks later, the district court made good on its earlier suggestion and formally ordered SFISD "to finalize a unified 1st Amendment religion/expression policy addressing all issues with options in content clearly set out" by October 13. The court also directed both parties to prepare and submit stipulations of fact by the same date.

In October 1995, SFISD for the first time adopted a written policy to address football game invocations. Its provisions were essentially identical to those of the July Policy on graduations. The football game prayer policy ("Football Policy") provides for a student-selected, student-given "brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." As with the July Policy on graduation, the Football Policy was to

provide no further guidance as to content (i.e., no "nonsectarian, nonproselytizing" limitation) *unless* SFISD should be "enjoined by a court order" to do so. "Then and only then" was an alternate policy containing a "nonsectarian, nonproselytizing" content limitation to take effect automatically. On the preordained date, SFISD submitted the July Policy and the Football Policy for the court's consideration.

Pursuant to a supplemental court order, the Does and SFISD eventually submitted 131 joint stipulations of fact. In February 1996, SFISD filed a motion for summary judgment on the basis that no evidence supported the conclusion that the school district currently or formerly sanctioned a policy or practice in violation of the Establishment Clause. The Does responded to this motion, but did not file a counter motion for summary judgment.

Early in June 1996, the district court issued a broad preliminary ruling addressing many of the issues in the case. Beginning with SFISD's liability for past practices, the court denied the school district's pending motion for summary judgment and instead granted summary judgment, *sua sponte*, in favor of the Does. Analyzing the question under the three parallel Establishment Clause tests applied by this court in *Clear Creek II*, 977 F.2d at 966-72, and *Ingebretsen v. Jackson Public School District*, 88 F.3d 274, 278-79 (5th Cir.), *cert. denied sub nom. Moore v. Ingebretsen*, ___ U.S. ___, 117 S.Ct. 388, 136 L.Ed.2d 304 (1996), the district court found that many of the incidents identified by the Does constituted impermissible coercion, endorsement, or purposeful advancement of religion by the State, and that SFISD could be fairly charged with having had *de facto* policies favoring the incidents

because they "occurred amidst the School District's repeated tolerance of similar activities and oftentimes with [its] awareness and explicit approval." In reaching this conclusion, the court noted that it relied on such of the Does' factual averments as had been acquiesced in by SFISD in addition to those identified in the joint stipulations, but that the court would afford SFISD a limited opportunity to object to the liability finding at the subsequent trial on damages, which the court tentatively scheduled for mid-July 1996.

In addressing the question of prospective injunctive relief from current policies, the district court decided to grant SFISD's motion for summary judgment on that point. It ruled that, whatever may have happened in the past, SFISD had abandoned any potentially problematic policies other than those concerning invocations and benedictions at graduations and football games. As to these policies, the court noted that they were essentially identical to the policies upheld by this Court in *Clear Creek II*, "except for the crucial distinction that the School District's [primary] policies do not require that any prayers delivered be nonsectarian and non-proselytizing." Because it read *Clear Creek II* as mandating this additional limitation, the court held that the initial paragraph of SFISD's July Policy and Football Policy constitutionally deficient. As each policy also contained an alternative provision that was fully consistent with *Clear Creek II*, and was specified to clutch in automatically if the court were to find the basic policy constitutionally lacking, however, the court ultimately concluded that injunctive relief would not be appropriate; the court could simply "order" SFISD to implement the fall-back

provisions of the July Policy and the Football Policy. The court therefore denied the Does' request for injunctive relief of any kind.

In December 1996, following a two-day trial on damages, the district court entered its final judgment. Citing *Collins v. City of Harker Heights*, 503 U.S. 115, 120-21, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992), and *Bennett v. City of Slidell*, 728 F.2d 762, 768 (5th Cir. 1984), the court held that imputed liability is not cognizable under § 1983, and that the Does had to prove more than the occurrence of isolated incidents to demonstrate that SFISD maintained an unconstitutional policy or custom for which it could be held liable in money damages under that statute. Reversing an unclear portion of its earlier ruling, the court found that each of the incidents for which the Does claimed actual, compensable harm, particularly the David Wilson "Mormon" matter, were nothing more than isolated occurrences, and were not attributable to a policy or custom of SFISD. The court further ruled, in the alternative, that, even if the claimed incidents could be attributed to SFISD policies, the Does had failed to prove any actual, compensable harm. The court concluded by entering a take-nothing judgment against the Does. Because it also concluded that the Does were unsuccessful as to every major issue in the litigation, the court ruled that they were not prevailing parties and denied their motion for attorney's fees under 42 U.S.C. § 1988. The court stated in the alternative that, even if the Does were technically prevailing parties, it would nonetheless deny them attorney's fees as an exercise of discretion, given that their success had been so limited and that they had protracted the litigation unnecessarily by insisting on

going to trial on their damage claims. From this final judgment, both SFISD and the Does timely appealed.

In its appeal, SFISD primarily challenges the district court's determination that a Clear Creek Prayer Policy must require that prayers or statements be "nonsectarian, nonproselytizing" to be constitutional. Should we be inclined to reverse the district court as to the denial of damages and attorney's fees, however, then SFISD also challenges the finding of liability for past Establishment Clause violations, claiming both procedural and substantive errors on the part of the district court.

In their appeal, the Does argue that the district court erred in (1) defining "nonsectarian, nonproselytizing" to permit reference to particular deities; (2) allowing SFISD to extend a Clear Creek Prayer Policy to football games; (3) denying injunctive relief; and (4) refusing to award attorney's fees. One plaintiff, referred to above as Jane Doe II, also appeals the denial of damages for the David Wilson "Mormon" incident.

II

ANALYSIS

We begin with SFISD's primary argument that a Clear Creek Prayer Policy need not include the "nonsectarian, nonproselytizing" requirements to be constitutional. SFISD rests this argument on two complementary contentions: (A) the nonsectarian, nonproselytizing restrictions of *Clear Creek II* were irrelevant to the court's Establishment Clause holding; and (B) SFISD, in its July Policy, has created a *limited public forum* and, therefore,

not only need not, but lawfully cannot, restrict the student speakers to nonsectarian, nonproselytizing invocations and benedictions, as such restrictions would constitute impermissible viewpoint discrimination under the Free Speech Clause.[7]

A. The Establishment Clause

In beginning our analysis, it is well to note that our role is necessarily limited to elucidating our prior precedent in the light of its context and such subsequent clarifications as the Supreme Court has announced. *See Hogue v. Johnson*, 131 F.3d 466, 491 (5th Cir. 1997) ("One panel of this Court may not overrule another [absent an intervening decision to the contrary by the Supreme Court or the en banc court . . .]."), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1297, 140 L.Ed.2d 334 (1998). The initial question may therefore be conveniently summarized by reviewing the holdings of *Clear Creek II* and its Supreme Court predecessor, *Lee*. By way of background, however, we first set forth the Supreme Court's three Establishment Clause tests.

1. Three Supreme Court Tests

As we have often observed, Establishment Clause jurisprudence is less than pellucid. We examine practices challenged on Establishment Clause grounds under three

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[7] Although for the sake of simplicity and clarity we address SFISD's arguments only as they relate to graduation ceremonies, our analysis applies with equal, if not greater, force to the Football Policy as well.

complementary (and occasionally overlapping) tests established by the Supreme Court. *Clear Creek II*, 977 F.2d at 963; *Ingebretsen*, 88 F.3d at 278.

a. The Lemon Test

The first test, and the one of the longest pedigree, is the disjunctive three-part *Lemon* test, under which a government practice is unconstitutional if (1) it lacks a secular purpose; (2) its primary effect either advances or inhibits religion; or (3) it excessively entangles government with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

b. The Coercion Test

The second test, which the Court announced in *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (invalidating school district's policy permitting school principals to invite clergy to give invocations and benedictions in form of "nonsectarian" prayer at graduation ceremonies), is commonly referred to as the Coercion Test. Under this test, school-sponsored religious activity is analysed to determine the extent, if any, to which it has a coercive effect on students. "[U]nconstitutional coercion [occurs] when: (1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors." *Clear Creek II*, 977 F.2d at 970 (citation omitted).

c. The Endorsement Test

The third test, known as the Endorsement Test, seeks to determine whether the government endorses religion by means of the challenged action. *County of Allegheny v. ACLU*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989). The government unconstitutionally endorses religion when "it conveys a message that religion is 'favored,' 'preferred,' or 'promoted' over other beliefs." *Id.* at 593, 109 S.Ct. 3086.

2. *Lee* and *Clear Creek II*

In *Lee*, the Supreme Court declared a school district's policy of allowing a high school principal to invite a religious official to give a nonsectarian, nonproselytizing invocation and benediction at graduation to be an unconstitutional "coercion" of participation in a state-directed religious exercise. *Lee*, 505 U.S. at 586, 112 S.Ct. 2649. Four Justices appeared to find the policy to be an unconstitutional "endorsement" of religion as well. *Id.* at 604-05, 112 S.Ct. 2649 (Blackmun, J., joined by Stevens & O'Connor, JJ., concurring) & 629-30 & n.8 (Souter, J., joined by Stevens & O'Connor, JJ., concurring); *cf. Allegheny*, 492 U.S. at 594, 109 S.Ct. 3086 (discussing endorsements).

Then, in *Clear Creek II*, applying the three Establishment Clause tests set forth above, we held that Clear Creek's policy of allowing a student-selected, student-given, nonsectarian, nonproselytizing invocation and benediction at a high school graduation ceremony – SFISD's fall-back provision in the July Policy – did not

violate the dictates of the Establishment Clause. *Clear Creek II*, 977 F.2d at 968-72.

SFISD asserts that a close reading of *Clear Creek II* reveals that the school district's graduation policy escaped the result in *Lee* not because of its "nonsectarian, nonproselytizing" content limitation, but rather *solely* because it permitted invocations and benedictions as long as they are student-selected and student-given. Inasmuch as our opinion in *Clear Creek II* specifically relied on the school district's requirement that the student-led graduation prayers be nonsectarian and nonproselytizing in holding that its policy did not offend the Establishment Clause, we find SFISD's reading of *Clear Creek II* to be specious at best.

First, we concluded in *Clear Creek II* that the twin restrictions served the dual functions of enhancing the graduation ceremony's solemnization, thus permitting the policy to clear Lemon's secular purpose hurdle, while simultaneously reducing the possibility of endorsing religion. *Clear Creek II*, 977 F.2d at 971 ("[T]he Resolution imposes two one-word restrictions 'nonsectarian and nonproselytizing' which enhance solemnization and minimize the advancement of religion."). Second, in *Clear Creek II*, we obviously relied on the nonsectarian, nonproselytizing nature of the prayers to determine that the BISD policy did not have the primary effect of advancing religion – *Lemon*'s second prong. *Id.* at 967 ("Its requirement that any invocation be nonsectarian and nonproselytizing minimizes any such advancement of religion."); *see also Doe v. Duncanville Ind. Sch. Dist.*, 70 F.3d 402, 406 (5th Cir. 1995) (distinguishing "quintessentially Christian prayer" basketball team prayers from

nonsectarian, nonproselytizing prayers in *Clear Creek II*). Moreover, as the primary-effect prong of Lemon "asks whether . . . the practice under review in fact conveys a message of *endorsement or disapproval*," *Lynch v. Donnelly*, 465 U.S. 668, 690, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (emphasis added), the character of the prayer being scrutinized is clearly relevant to the Supreme Court's closely-related Endorsement Test as well. Finally, we rested our determination that the graduation prayers did not constitute a "formal religious exercise" for the purposes of *Lee*'s Coercion Test in principal part on the fact that Clear Creek's policy permitted only nonsectarian, nonproselytizing prayers. *Clear Creek II*, 977 F.2d at 971.

Thus, contrary to SFISD's conclusional suggestion, *Clear Creek II* did not hold that a policy is insulated from constitutional scrutiny under the Establishment Clause merely because it permits, rather than requires, religious speech when selected and given by students.[8] Much more than mere window dressing, the content restrictions that SFISD now attempts to cast aside were, in fact, central to our holding in the *Clear Creek II*.[9] More to the point, we

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[8] In his dissent, Judge Jolly places great emphasis on the fact that the Supreme Court has held that the nonsectarian nature of a graduation prayer cannot resuscitate an otherwise unconstitutional graduation prayer. We do not hold otherwise. Rather, we simply follow *Clear Creek II*'s unmistakable conclusion that, although not sufficient, a policy's nonsectarian, nonproselytizing requirements are necessary.

[9] More generally, it is beyond peradventure that government measures that lend succor to a particular religion, denomination or sect fall at the very core of the conduct

now conclude, in obeisance to the ineluctable precedent of *Clear Creek II*, that a knock-off of a Clear Creek Prayer Policy that does not limit speakers to nonsectarian, nonproselytizing invocations and benedictions violates the dictates of the Establishment Clause.

3. Applying the Tests

Given the posture of this case, we limit our primary discussion to those portions of the Supreme Court's three Establishment Clause tests with regard to which *Clear Creek II* discussed the twin restrictions. Turning first to *Lemon*'s secular purpose requirement, SFISD argues that, as in *Clear Creek II*, its July Policy is designed to solemnize its graduation ceremonies. We are, of course, mindful of the deference courts typically afford a government's articulation of secular purpose. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986); *Clear Creek II*, 977 F.2d at 965-66. Nevertheless, the government's statement of secular purpose cannot be a mere "sham." *Edwards v. Aguillard*, 482 U.S. 578, 586-87, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987). Here we simply cannot fathom how permitting students to deliver sectarian and

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proscribed by the Establishment Clause. *See, e.g., Larson v. Valente*, 456 U.S. 228, 246 (1982) ("Since *Everson v. Board of Education*, this Court has adhered to the principle, clearly manifested in the history and logic of the Establishment Clause, that no State can 'pass laws which aid one religion' or that 'prefer one religion over another.' ") (citation omitted); *Board of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 696, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994) (emphasizing neutrality among religious sects is central to Establishment Clause jurisprudence).

proselytizing prayers can possibly be interpreted as furthering a solemnizing effect. Such prayers would alter dramatically the tenor of the ceremony, shifting its focus – at least temporarily – away from the students and the secular purpose of the graduation ceremony to the religious content of the speaker's prayers. Indeed, an almost inevitable consequence of permitting the uttering of such prayers would be the polarizing and politicizing of an event intended to recognize and celebrate the graduating students' academic achievements and the commonality of their presence and the path on which they are about to embark. In short, rather than solemnize a graduation, sectarian and proselytizing prayers would transform the character of the ceremony and conceivably even disrupt it.

The context of the evolutionary history in which SFISD developed its series of prayer policies further confirms the school district's penumbral religious purpose. As described above, SFISD first formulated an "almost" Clear Creek Prayer Policy, one which permitted students to deliver nonsectarian and nonproselytizing prayers (the October Policy); then, following the district court's initial ruling, adopted a "pure" Clear Creek Prayer Policy (the May Policy); and finally, on further reflection, created its ultimate twin-tiered policy (the July Policy), initially dropping the key content restrictions until and unless the district court should hold the primary policy unconstitutional and thereby trigger automatic implementation of the fall-back provision. As students were already permitted to deliver invocations and benedictions (even in the form of prayer) under SFISD's previously articulated policies, it is impossible to conclude that this final revision

was anything but an attempt to encourage sectarian and proselytizing prayers – a purpose which is the antithesis of secular. *See Ingebretsen*, 88 F.3d at 279 (holding school district's policy permitting student-initiated prayer at compulsory or non-compulsory school events did not have secular purpose because (1) its clear intent was to inform students, teachers, and administrators they can pray at school events as long as student "initiated" prayer and (2) policy was passed as part of legislature's reaction to punishment of school president who championed prayer in school). Our cynicism about the school board's proffered secular purpose is galvanized by SFISD's inclusion of the fall-back alternative that would re-insert the twin restrictions *ipso facto* should the district court invalidate the basic provision of the July Policy.

Second, we conclude that, when shorn of the nonsectarian, nonproselytizing restrictions, SFISD's modified Clear Creek Prayer Policy fails Lemon's primary effect prong as well. "The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Lynch*, 465 U.S. at 690, 104 S.Ct. 1355. This consideration is especially important in the context of public schoolchildren. *Aguillard*, 482 U.S. at 583-84, 107 S.Ct. 2573; *cf. Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist.*, 669 F.2d 1038, 1048 (5th Cir. 1982) (holding that high school was not public forum and stating "[w]hile students have First Amendment rights to political speech in public school, sensitive Establishment Clause considerations limit their right to air religious doctrines.").

Again, in *Clear Creek II*, we determined that a student-led, nonsectarian, nonproselytizing prayer would serve to solemnize the graduation ceremony and thus would not have the primary effect of advancing religion. *Clear Creek II*, 977 F.2d at 967. As our later cases of *Ingebretsen* and *Duncanville* make abundantly clear, though, the mere fact that prayers are student-led or student-initiated, or both, does not automatically ensure that the prayers do not transgress *Lemon*'s second prong. *Ingebretsen*, 88 F.3d at 279 (holding school district's policy permitting student-initiated prayer at compulsory and non-compulsory school events had primary effect of advancing religion); *Duncanville*, 70 F.3d at 407 (distinguishing *Clear Creek II* and holding school officials' supervision of student-initiated and student-led prayers preceding basketball games violated Establishment Clause, in part because prayers were "quintessentially Christian"). Indeed, if subjecting a prayer policy to a student vote were alone sufficient to ensure the policy's constitutionality, what would keep students from selecting a formal religious representative, such as the rabbi in *Lee*, to present a graduation prayer? Indeed, to take the argument one step further, there would be no reason to deny the students the authority to designate a formal religious representative to deliver a full-fledged, fire-and-brimstone, Bible- or Koran-quoting, sectarian sermonette (in the dress for a prolonged invocation or benediction) at graduation; for, by putting the ultimate choice to the students, the sermonette would not facially bear the government's imprimatur.

But government imprimatur is not so easily masked: Prayers that a school "merely" permits will still be delivered to a government-organized audience, by means of government-owned appliances and equipment, on government-controlled property, at a government-sponsored event, thereby clearly raising substantial Establishment Clause concerns. *Cf. Lee*, 505 U.S. at 597, 112 S.Ct. 2649 (School officials "retain a high degree of control over the precise contents of [a graduation ceremony], the speeches, the timing, the movements, the dress, and the decorum of the students."); *Jones v. Clear Creek Ind. Sch. Dist.*, 930 F.2d 416, 418 (5th Cir. 1991) (*"Clear Creek I"*) (Graduation prayer policy "is subject to Establishment Clause scrutiny because it is the mechanism through which the state provides space in a closed forum for arguably religious speech at a government sponsored event."), *vacated*, 505 U.S. 1215, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992); *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824, 831 (11th Cir. 1989) (examining school practice under Establishment Clause "[w]hen religious invocation is given via a sound system controlled by school principals and the religious invocation occurs at a school-sponsored event at a school-owned facility"). And when the school "permits" sectarian and proselytizing prayers – which, by definition, are designed to reflect, and even convert others to, a particular religious viewpoint and which, as stated above, do not serve (and even run counter to) the permissible secular purpose of solemnizing an event – such "permission" undoubtedly conveys a message not only that the government endorses religion, but that it endorses a particular form of religion.

For the very same reasons, SFISD's prayer policy obviously violates the Supreme Court's Endorsement Test as well, which asks whether the government has appeared to take a position on questions of religious belief or has conveyed a message that religion is favored, preferred, or promoted over other beliefs. *Ingebretsen*, 88 F.3d at 280.

Having concluded that student-selected, student-given, sectarian, proselytizing invocations and benedictions at high school graduations violate both the *Lemon* test and the Endorsement test, we are not required to determine that such public school prayer policies also run afoul of the Coercion Test to hold them antithetical to the Establishment Clause. We nevertheless offer the following observation for the sake of completeness.

As alluded to above, *Clear Creek II* held that the Clear Creek Prayer Policy did not constitute a "formal religious exercise" because (1) the prayers were not delivered by a member of the clergy, and (2) the prayers were nonsectarian and nonproselytizing. *Clear Creek II*, 977 F.2d at 971. Prayer, of course, is a "quintessential religious practice," *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981), *aff'd*, 455 U.S. 913, 102 S.Ct. 1267, 71 L.Ed.2d 455 (1982); and prayer in school raises particularly sensitive constitutional concerns. As the Supreme Court stated in *Aguillard*:

> The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views

> that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.

Aguillard, 482 U.S. at 583-84, 107 S.Ct. 2573. Only the combination of the factors relied on in *Clear Creek II* – that the prayer was student-led *and* nonsectarian, nonproselytizing – saved that school district's graduation prayers from being anathematized a "formal religious exercise" for the purposes of *Lee*'s Coercion Test. *Cf. Lee*, 505 U.S. at 588-90, 112 S.Ct. 2649 (holding nonsectarian, nonproselytizing graduation prayer delivered by rabbi was "formal religious exercise"). Again, because sectarian and proselytizing prayers are by their very nature designed to promote a particular religious viewpoint rather than solemnize an otherwise purely secular event, they cannot find sanctuary in the tightly circumscribed safe harbor of *Clear Creek II* and thereby avoid the appellation "formal religious exercise."[10]

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[10] SFISD advances the argument that, because SFISD permits but does not require prayer, such a prayer does not constitute a formal religious exercise. See *Clear Creek II*, 977 F.2d at 971 ("By contrast [to *Lee*], the Resolution tolerated nonsectarian, nonproselytizing prayer, but does not require or favor it."). This contention is wholly unpersuasive, as a religious practice derives its religious nature from its content and historical significance, not from whether it is permitted or required by the school. Neither a baptism nor a bar mitzvah, for examples, would be somehow transformed into a secular events if a school set up a procedure by which its students were permitted to vote to include such a ritual in its graduation ceremony.

Nevertheless, as the Coercion Test is conjunctive and there is no distinguishing difference between SFISD's policy and the policy of Clear Creek ISD in *Clear Creek II* with regard to the test's other two prongs – government direction and obligatory participation – we need not and therefore do not belabor the point by addressing today whether SFISD's policy violates the Coercion Test. It suffices that, when stripped of one of the foundational elements on which *Clear Creek II* is constructed, SFISD's graduation prayer policy is so constitutionally deficient that it cannot stand. By failing to prohibit sectarian and proselytizing prayers, the July Policy not only lacks a secular purpose, but has the primary effect of advancing, and unconstitutionally endorsing religion.

B. The Free Speech Clause

Finding the landscape of Establishment Clause jurisprudence inhospitable, SFISD alternatively seeks sanctuary for its graduation prayer policy in the Free Speech Clause, a contention to which we now turn. SFISD asserts that its July Policy survives constitutional scrutiny because through this policy it has created a "limited public forum." This being the case, continues SFISD, it is not simply permissible for the school district to allow sectarian and proselytizing student prayers, but SFISD would be guilty of unconstitutional viewpoint discrimination were it to do otherwise. We disagree with these assertions for the simple reason that as a matter of law SFISD has not created a limited public forum. *See American Civil Liberties Union of New Jersey v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1477-78 (3d Cir. 1996)

(holding that school board's graduation prayer policy permitting students to vote to include prayer in graduation ceremony did not create limited public forum); *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447, 456-57 (9th Cir. 1994) (same), *vacated as moot*, 515 U.S. 1154, 115 S.Ct. 2604, 132 L.Ed.2d 849 (1995).

We begin with the basics. "There are three classifications of fora." *Hobbs v. Hawkins*, 968 F.2d 471, 481 (5th Cir. 1992) (quoting *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 802, 105 S.Ct. 343, 87 L.Ed.2d 567 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)). The first category is the traditional public forum. These are places, such as public parks and streets, " 'which by long tradition or by government fiat have been devoted to assembly and debate.' " *Id.* (quoting *Cornelius*, 473 U.S. at 802, 105 S.Ct. 3439). Second, there is " 'the public forum created by government designation.' " *Id.* This type of forum " 'may be created by government designation of a place or channel of communication [not traditionally open to assembly and debate] for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.' " *Id.* Finally, there is the " 'nonpublic' forum." *Id.* (quoting *Cornelius*, 473 U.S. at 803, 105 S.Ct. 3439). "This is the residual class of government-owned property, to which the First Amendment does not guarantee access." *Id.*

A graduation ceremony is quite obviously not a traditional public forum. The question, therefore, under the July Policy is whether SFISD's commencement program constitutes a government designated public forum, or,

more accurately, whether the portions of the commencement program allocated to the invocation and benediction constitute designated public fora. Two factors are key to determining whether the State has transformed its property into a designated public forum. The first is governmental *intent*. *Cornelius*, 473 U.S. at 802, 105 S.Ct. 3439 ("[T]he Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum"). The nature of the State property and its compatibility with expressive activity are important indicia of intent. *Id.* at 802, 105 S.Ct. 3439; *see also Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, ___, 118 S.Ct. 1633, 1639, 140 L.Ed.2d 875 (1998) (holding public television broadcasting not generally a public forum and stating in broadcasting "broad rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations . . . must exercise to fulfill their journalistic purpose and statutory obligations."); *Muir v. Alabama Educ. Television Com'n*, 688 F.2d 1033, 1042 (5th Cir. 1982) ("A facility is a public forum only if it is designed to provide a general public right of access to its use, or if such public access has historically existed and is not incompatible with the facility's primary activity.").

The second factor relevant to determining whether the government has established a public forum is the extent of the use granted. *See Perry*, 460 U.S. at 46-47, 103 S.Ct. 948. A designated public forum may, of course, be limited to a specified class of speakers or to discussion of specified subjects – thus the term "limited public forum." *Estiverne v. Louisiana State Bar Assoc.*, 863 F.2d 371, 378

(5th Cir. 1989). Nevertheless, the State does not create a designated public forum "by inaction or by *permitting limited discourse.*" *Cornelius*, 473 U.S. at 802, 105 S.Ct. 3439 (emphasis added). To create such a forum, the government must allow "general access" to, *Id.* at 802, 105 S.Ct. 3439, or "indiscriminate use" of, *Perry*, 460 U.S. at 47, the forum in question by the general public, or by particular speakers, or for the discussion of designated topics.

Regarding the first factor – governmental intent – it is clear that the government's proffered intent does not govern this inquiry, else it would be a limited inquiry indeed. In the typical case, to justify a limitation it has placed on the speech of private individuals, the State asserts that it has not created a designated public forum. In the instant case, the reverse is true: SFISD attempts to evade the requirements of the Establishment Clause by running for the protective cover of a designated public forum. We must, therefore, view skeptically SFISD's own self-serving assertion of its intent and examine closely the relationship between the objective nature of the venue and its compatibility with expressive activity.

In *Estiverne*, we framed the relevant inquiry as: "Does the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views on issues of political and social significance?" *Estiverne*, 863 F.2d at 378-79. SFISD's July Policy flunks this test hands down.

Neither its character nor its history makes the subject graduation ceremony in general or the invocation and

benediction portions in particular appropriate fora for such public discourse. *See Brody v. Spang*, 957 F.2d 1108, 1117 (3d Cir. 1992) ("Graduation ceremonies have never served as forums for public debate or discussions, or as a forum through which to allow varying groups to voice their views.") (quotation and citation omitted); *cf. Hays County Guardian v. Supple*, 969 F.2d 111, 116-18 (5th Cir. 1992) (concluding that university campus was limited public forum because it served as central site of student body and because university's written policies established a "general policy of open access"). For obvious reasons, graduation ceremonies – in particular, the invocation and benediction portions of graduation ceremonies – are not the place for exchanges of dueling presentations on topics of public concern. *See Duncanville*, 70 F.3d at 406 ("The [basketball] games are school-sponsored and controlled events that do not provide any sort of open forum for student expression. . . . "). Such presentations would undoubtedly clash with a ceremony's "primary activity." *See Muir*, 688 F.2d at 1042. Indeed, a graduation ceremony comprises but a single activity which is singular in purpose, the diametric opposite of a debate or other venue for the exchange of competing viewpoints.

It is not surprising then that SFISD has not, in fact, opened the ceremony to such exchanges, which brings us to the second relevant factor – extent of use. In no way can SFISD be said to have granted "general access" to a class speakers at its graduation ceremony. Rather, it has simply concocted a thinly-veiled surrogate process by which a very limited number of speakers – one or two – will be chosen to deliver prayers denominated as invocations and benedictions. These speakers, moreover, will

not be given free reign to address issues, or even a particular issue, of political and social significance. Rather, they will be chosen to deliver very circumscribed statements that under any definition are prayers. *See* Webster's Third New International Dictionary at 1190 (defining "invocation" as "the action or an act of petitioning for help or support") & 203 (defining "benediction," similarly, as "an expression or utterance of blessing or good wishes") (1993). SFISD has thus granted no one, not even the students elected to give the invocations and benedictions, "indiscriminate use" of its government controlled channel of communication. *Perry*, 460 U.S. at 47, 103 S.Ct. 948; *see also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (holding that school-run student newspaper was not designated forum because school officials "did not evince either by policy or practice any intent to open the pages of [newspaper] to indiscriminate use by its student reporters and editors, or by the student body generally") (quotations and citations omitted).

In short, even though the government may designate a forum only for particular speakers or for the discussion of particular topics, *Cornelius*, 473 U.S. at 802, 105 S.Ct. 3439, SFISD's restrictions so shrink the pool of potential speakers and topics that the graduation ceremony cannot possibly be characterized as a public forum – limited or otherwise – at least not without fingers crossed or tongue in cheek. *Cf. Forbes*, 523 U.S. at ___, 118 S.Ct. at 1640 (holding candidate debates constitute narrow exception to general rule that public broadcasting does not constitute public form because (1) *"debate was by design a forum for political speech by candidates,"* and (2) candidate debates

are, by tradition, of exceptional significance in electoral process); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) ("Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and *open to all on equal terms.*") (emphasis added).

Clear Creek II does not hold to the contrary. Although our opinion in that case does advert to *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990), which rests, in part, on public forum analysis, *Clear Creek II* does not rely on *Mergens* for the conclusion that the Clear Creek ISD had created a public forum. Rather, *Clear Creek II* adverts to *Mergens* only within the limited context of its Endorsement Test analysis, concluding that the graduation prayer policy at issue "paralleled" the practices held constitutional in *Mergens*.[11] *Clear Creek II*, 977 F.2d at 968-69.

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[11] There is, moreover, a crucial distinction between the speech involved in *Mergens* and the speech that SFISD's policy would allow. In *Mergens*, the Court held that permitting the Christian student organization to meet on school grounds after class and to recruit members through the school newspaper, bulletin boards, and public address system, did not violate the Establishment Clause. Thus, the organization was not permitted to deliver a religious message directly to the student body. The religious organization did not use any of the various methods of communication controlled by the school to proselytize – or to deliver religious messages of any nature – but rather confined such activities to meetings held after class with virtually no trace of governmental imprimatur. *Clear Creek II* took *Mergens* one baby step closer to the brink, allowing delivery of prayer to

Indeed, nowhere in the *Clear Creek II* opinion does the term "public forum" even appear.

This should surprise no one. For, if a graduation program, open, as it is, to such a limited number of student-elected or selected speakers, constitutes a limited public forum, the graduation prayer policy blessed in *Clear Creek II* would, in fact, be *un*constitutional – not, however, as a violation of the Establishment Clause, but as impermissible viewpoint discrimination: Once the State has established a limited public forum, it cannot discriminate against speech because of the message, even if that message is religious in nature. *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 828-31, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (holding unconstitutional university's decision to deny generally-available school funds to student organization publishing newspaper because of newspaper's Christian editorial viewpoint); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-96, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (holding unconstitutional school's policy of denying school facilities to group desiring to show film series addressing child-rearing questions from a "Christian perspective" as impermissible viewpoint discrimination). Thus, if public forum analysis were applicable, then Clear Creek's proscription of prayer that is sectarian and proselytizing would violate the First Amendment after all, but

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the student body but only if such prayer were nonsectarian and nonproselytizing. SFISD's July Policy, however, would plunge over the cliff, by permitting students to present overtly sectarian and proselytizing religious prayers to a group of students clearly assembled at the behest of the government.

would do so on grounds we never considered in *Clear Creek II*.[12]

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[12] Judge Jolly accuses us of unprecedentedly permitting the government to review (and thus control) the content of citizens' purely private speech (in the form of prayer) to determine whether that speech transgresses the required nonsectarian, nonproselytizing restrictions. Judge Jolly's accusation, however, only serves to highlight that *Clear Creek II* did not hold that the school district had created a public forum. In that decision, we explicitly approved a school district's review of the content of the student-initiated, student-led graduation prayers. *Clear Creek II*, 977 F.2d at 967 ("We know of no authority that holds yearly review of unsolicited material for sectarianism and proselytization to constitute excessive entanglement."). Judge Jolly is thus faced with a dilemma – either, contrary to his assertions, we did not hold in *Clear Creek II* that the school district created a public forum or, as Judge Jolly argues, we did so hold, but additionally approved the type of governmental review he now condemns.

Because (1) we do not believe that the student-initiated, student-led invocation and benediction portions of a graduation ceremony satisfy the requirements of a public forum, (2) the *Clear Creek II* opinion never once utters the term "public forum" despite its consideration of *Mergens*, a public forum case, and (3) the *Clear Creek II* opinion explicitly approves the school district's review of the students' graduation prayers for sectarianism and proselytization, a review that would undoubtedly constitute impermissible viewpoint discrimination if the students' graduation prayers constituted purely private speech, we will not, as Judge Jolly urges, strain to read our earlier decision to hold contrary to its plain language that the school district had carved out a limited public forum. Whether or not we agree with *Clear Creek II*'s conclusion that the student-led graduation prayers do not transgress the Establishment Clause even though they do not constitute private speech, we are bound by its judgment unless and until this Court reconsiders the matter en banc or the Supreme Court holds otherwise.

In sum, our *Clear Creek II* opinion explicitly – and (we are bound by stare decisis to acknowledge) correctly – relies on Clear Creek ISD's nonsectarian, nonproselytizing restrictions to dodge the outcome otherwise dictated by *Lee*. Without these twin restrictions, a Clear Creek Prayer Policy cannot withstand constitutional scrutiny. Moreover, SFISD cannot escape this result by piously wrapping itself in the false banner of "limited public forum." The July Policy created no forum at all and therefore could not, and did not, trigger the First Amendment's prohibition of viewpoint discrimination. The limited number of speakers, the monolithically noncontroversial nature of graduation ceremonies, and the tightly restricted and highly controlled form of "speech" involved, all militate against labeling such ceremonies as public fora of any type. Absent feathers, webbed feet, a bill, and a quack, this bird just ain't a duck!

The district court, therefore, did not err in rejecting SFISD's stretch to reach limited public forum status for its graduation and through it find viability for the July Policy in the Free Speech Clause. Neither did the court err in holding that provisions of the initial paragraph of SFISD's July Policy violates the Establishment Clause or in ordering SFISD to institute the fall-back alternative – a pure Clear Creek Prayer Policy – in its stead. We need only note briefly that the district court did, however, clearly err in overbroadly defining "nonsectarian" to include reference to specific "deities," *see, e.g.*, Webster's Third New International Dictionary at 1538 (defining "nonsectarian" as "not restricted to or dominated by a particular religious group"), a mistake the district court

can easily correct on remand. A nonsectarian, nonproselytizing prayer that, for example, invokes the name of Buddha or Mohammed or Jesus or Jehovah is an obvious oxymoron.

C. Football Games

Having concluded that SFISD's modified Clear Creek Prayer Policy does not pass constitutional muster, we must next address whether the pure Clear Creek Prayer Policy embodied in the alternative fall-back provision of the policy can be extended to football games through the Football Policy. In *Duncanville*, we confronted virtually the identical issue. There, the district court had enjoined employees of the school district from, *inter alia*, supervising student-initiated, student-led prayers during athletic events. *Duncanville*, 70 F.3d at 406. In upholding the injunction, we distinguished *Clear Creek II*, stating:

> In concluding that [the Clear Creek] resolution did not violate the Establishment Clause, we emphasized that high school graduation is a significant, once-in-a-lifetime event that could appropriately be marked with a prayer, that the students involved were mature high school seniors and the challenged prayer was to be non-sectarian and non-proselytizing. Here, we are dealing with a setting [football and basketball games] far less solemn and extraordinary, a quintessentially Christian prayer, and students of twelve years of age. . . . *Id.*

SFISD argues that the present case is more closely analogous to *Clear Creek II* than to *Duncanville* because in the latter the students spontaneously initiated the prayers

in question, whereas here, as in *Clear Creek II*, they do so by vote. SFISD's argument, however, widely misses the mark. The controlling feature here is the same as in *Duncanville:* The prayers are to be delivered *at football games* – hardly the sober type of annual event that can be appropriately solemnized with prayer. The distinction to which SFISD points is simply one without difference. Regardless of whether the prayers are selected by vote or spontaneously initiated at these frequently-recurring, informal, school-sponsored events, school officials are present and have the authority to stop the prayers. Thus, as we indicated in *Duncanville*, our decision in *Clear Creek II* hinged on the singular context and singularly serious nature of a graduation ceremony. Outside that nurturing context, a Clear Creek Prayer Policy cannot survive. We therefore reverse the district court's holding that SFISD's alternative Clear Creek Prayer Policy can be extended to football games, irrespective of the presence of the nonsectarian, nonproselytizing restrictions. *See Jager*, 862 F.2d at 832-33 (holding "equal access" policy for football game invocations unconstitutional).

D. Injunctive Relief

Turning next to the Does' equitable claim, we review the district court's denial of an injunction for abuse of discretion. *Lubbock*, 669 F.2d at 1049. As we agree with the district court that it can simply order SFISD to put into effect the fall-back alternative of the July Policy, we address only whether the Does are entitled to injunctive relief regarding SFISD's other practices. The district court expressly found that SFISD had ceased all such unlawful practices. Given a trial court's greater ability to evaluate

the evidence regarding a defendant's future propensity to engage in proscribed activities, we are generally reluctant to overturn a denial of injunctive relief. *Id.* (refusing to reverse trial court's denial of injunctive relief even though defendant had engaged in impermissible practices over several years and only ceased on eve of trial); *Meltzer v. Board of Pub. Instruction of Orange County*, 548 F.2d 559, 562-568 (5th Cir. 1977) (refusing to reverse district court's denial of injunctive relief even though school district had proved very reluctant to comply with constitutional requirements of Establishment Clause), *aff'd on rehearing*, 577 F.2d 311 (1978). The Does, moreover, point to no evidence in support of their contention that a threat of future unconstitutional practices exists other than the fact of SFISD's removal of the "nonsectarian, nonproselytizing" language from its final graduation and football game policies, a threat negated by the district court in ordering implementation of the fall-back alternative and extinguished by us in this appeal. We therefore conclude that the district court's denial of injunctive relief was not an abuse of discretion.

E. Attorney's Fees

Under § 1988, the district court may make an award of attorney's fees only if it determines that the claimant is a "prevailing party." *Walker v. HUD*, 99 F.3d 761, 767 (5th Cir. 1996); *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). A party prevails when he succeeds on "any significant issue in litigation which achieve[s] some of the benefit [he] sought in bringing suit." *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989)

(quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Id.* at 792-93, 109 S.Ct. 1486.

In this case, the Does have obtained a judgment vindicating the Santa Fe students' important First Amendment rights in both graduation ceremony and football game contexts. They "have thus served the 'private attorney general' role which Congress meant to promote in enacting § 1988." *Garland*, 489 U.S. at 793, 109 S.Ct. 1486; *see also Hall v. Board of Sch. Comm'rs of Conecuh County*, 656 F.2d 999, 1003 (5th Cir. 1981) (holding plaintiffs who prevailed on claims that high school's morning devotional readings over public address system and teaching elective Bible literature course were violative of Establishment Clause were entitled to attorney's fees). Accordingly, on remand the district court shall award the Does reasonable and realistic attorney's fees as prevailing parties.

F. Monetary Damages

Addressing next Jane Doe II's appeal from the denial of damages for the David Wilson "Mormon" incident, we need do no more than simply state our agreement with the district court's assessment of the evidence on that point. Regardless of the outcome of the question whether SFISD truly had a policy of tolerating Establishment Clause abuses, our independent review of the summary judgment record leaves us with no doubt that it is simply devoid of evidence establishing a genuine dispute of

material fact that Jane Doe II suffered any compensable harm stemming from Wilson's insensitive and misguided conduct. *See Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 940 (5th Cir. 1996) (requiring that the evidence "manifest[ ] some specific discernable injury to the claimant's emotional state"), *cert. denied*, 519 U.S. 1091, 117 S.Ct. 767, 136 L.Ed.2d 713 (1997).

G. Toleration of Establishment Clause Violations

Finally, because we do not disturb the district court's rulings on damages and because we base our decision that the Does are entitled to attorney's fees on our holdings regarding SFISD's graduation and football game prayer policies – not on a finding that SFISD had a policy of tolerating Establishment Clause violations – we need not consider SFISD's challenge to the district court's summary judgment ruling on liability for past Establishment Clause violations.

III

CONCLUSION

For the foregoing reasons, we (1) AFFIRM the district court's ruling that the words "nonsectarian, nonproselytizing" are constitutionally necessary components of a viable Clear Creek Prayer Policy; (2) REVERSE that court's holding that SFISD's Clear Creek Prayer Policy can permissibly extend to prayers before (or after) football games; (3) AFFIRM the court's judgment that neither damages nor injunctive relief are appropriate in this case; and (4) REVERSE the district court's denial of attorney's

fees for the Does and REMAND this case for determination of reasonable attorney's fees and an award of such fees to the Does, consistent with this opinion.

AFFIRMED in part; REVERSED in part; and REVERSED and REMANDED in part, with instructions.

APPENDIX B

E. GRADY JOLLY, Circuit Judge, dissenting:

Today, for the first time in our court's history, the majority expressly exerts control over the content of its citizens' prayers. And it does so notwithstanding that the Supreme Court has never required, suggested, hinted, or implied that the Constitution controls the *content* of citizens' prayers in any context. To the contrary, Supreme Court precedent clearly indicates that the majority's view transgresses the most fundamental First Amendment rights. I therefore respectfully dissent.

I

The majority's exegesis contains two primary flaws that allow it to free fall into the black pit of the constitutionally forbidden, that school districts must control the content of graduation prayers to assure that they are "nonsectarian and nonproselytizing."[1] First, the majority

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[1] The nonsectarian, nonproselytizing restriction constitutes viewpoint, not subject matter, discrimination. Such a restriction clearly allows the subject matter of religion, or ultimate reality, to enter the graduation ceremony. The majority does not, and indeed could not, disagree with this characterization. *See generally Rosenberger v. Rectors and Visitors of the Univ. of Virginia*, 515 U.S. 819, 830-31, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); *see also Chaudhuri v. Tennessee*, 130 F.3d 232, 237 (6th Cir. 1997) (noting that the nonsectarian prayer at issue "evoke[s] a monotheistic tradition not shared" by some religious peoples, including Hindus), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1308, 140 L.Ed.2d 473 (1998). Furthermore, it is instructive to note that the term "proselytize" is simply a word used – sometimes pejoratively – in lieu of the term "persuade." *See* Webster's

reads *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992)[2] in a way that openly oppugns the Supreme Court's reasoning in *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992).[3] The Court in Lee clearly held that the nonsectarian nature of a graduation prayer cannot save an otherwise unconstitutional graduation policy from the Establishment Clause. Yet in the face of this holding, the majority nevertheless audaciously concludes that a "nonsectarian, nonproselytizing" requirement constitutes a necessary element to our court's decision upholding the graduation policy in *Clear Creek II*.

The majority makes its second mistake by failing to recognize that the government may not restrict religious speech based on viewpoint when the government has created a forum for the expression of privately held

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Third New International Dictionary at 1821 (defining the verb "proselyte" as "to convert from one religion, belief, opinion, or party to another"). Free market enthusiasts and environmentalists can attempt to "proselytize" as well as Baptists and Mormons.

[2] As a point of nomenclature, our court has in the past referred to this case as *Jones II*. *See, e.g., Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 405 (5th Cir. 1995); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 278 (5th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 388, 136 L.Ed.2d 304 (1996). I join the majority in at least one of several breaks with precedent and refer to the case as *Clear Creek II*.

[3] The majority omits any mention of the fact that the Supreme Court vacated our decision in *Jones v. Clear Creek Indep. Sch. Dist.*, 930 F.2d 416 (5th Cir. 1991) (*Clear Creek I*), *vacated*, 505 U.S. 1215, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992), and specifically instructed our court to reconsider the case in the light of *Lee*. This is the context in which we issued our *Clear Creek II* opinion.

views.[4] This mistake leads the majority to reach a conclusion, which, however handy and expedient it may be, frustrates the neutral accommodation of religious viewpoints. When the government restricts sectarian and proselytizing religious speech, while embracing ecumenical religious speech, the government has engaged in illegitimate, viewpoint discrimination. That is why the Free Speech Clause is violated when the majority forces a nonsectarian, nonproselytizing requirement upon the speakers. In short, the majority's control over the content of students' prayers achieves the jurisprudentially rare

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[4] This mistake is, undoubtedly, a product of the majority's decision to treat the Free Speech Clause as an isolated afterthought. By first engaging in a separate Establishment Clause analysis, the majority virtually preordains the outcome before it addresses the Free Speech Clause. This approach fails to acknowledge the complex interaction of the Free Exercise, Establishment, and Free Speech Clauses. One prominent First Amendment scholar has described the source of this complexity in the following way:

> The central feature of the constitutional law of speech and press is a prohibition on "content-based" discrimination, except in the most compelling of circumstances. Yet the distinction between religion and nonreligious ideologies and institutions – a distinction seemingly demanded by the very text of the Religion Clauses – is based on the content of ideas and beliefs. The content-neutral thrust of the Free Speech Clause thus coexists uneasily with the special status of religion under the Free Exercise and Establishment Clauses.

Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 118 (1992).

result of offending not only one, but three provisions within the First Amendment.[5]

II

Let me try to fit this case into the context of our precedent. The question before us is, quite simply, what was it about the *Clear Creek II* policy that allowed it to escape the result in *Lee*? To put the question another way, is it enough for an invocation to be student-elected and student-given, or is the addition of a "nonsectarian, nonproselytizing" content limitation required in order to pass constitutional muster? The majority makes the unprecedented assumption that the content of a speaker's prayer – specifically, whether the prayer is sectarian or persuasive – can have some effect on its status under the Establishment Clause. Jurists cannot draw many categorical conclusions about the Supreme Court's treatment of the Establishment Clause. Nevertheless, the majority's assumption has the vice of offending one immutable holding of the Court's Establishment Clause jurisprudence: The government may not mitigate Establishment Clause concerns by requiring prayers to be nonsectarian and nonproselytizing. I can locate no place in the Court's extensive Establishment Clause jurisprudence for a "nonsectarian, nonproselytizing" exception to the Clause's command. The additional verbiage was therefore unnecessary in upholding the graduation policy in *Clear Creek II*.

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[5] These three provisions, read together, state: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . " U.S. CONST. amend. I.

A

I begin with some first principles. From its earliest forays into interpretation of the Establishment Clause, the Court consistently characterized it as prohibiting more than the direct establishment of a single national (or, after *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), and *Everson v. Board of Educ.*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), state) church. *See, e.g., Davis v. Beason*, 133 U.S. 333, 342, 10 S.Ct. 299, 33 L.Ed. 637 (1890) (noting that "[t]he first amendment to the Constitution . . . was intended . . . to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect"); *Reynolds v. United States*, 98 U.S. (8 Otto) 145, 164, 25 L.Ed. 244 (1878) (holding that "Congress was deprived of all legislative power over [religious] opinion" by the Clause); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 730, 20 L.Ed. 666 (1871) (noting that the Clause serves both to " 'rescue[ ] the temporal institutions from religious interference,' " and to " 'secure[ ] religious liberty from the invasion of the civil authority' ") (quoting *Harmon v. Dreher*, 17 S.C. Eq. (Speer's Eq.) 87, 120 (S.C. 1843)); *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 52, 3 L.Ed. 650 (1815).

The Court's modern jurisprudence has continued the tradition set by the early cases, and makes clear that the Establishment Clause paints in broad prohibitive strokes when it comes to state or federal action in the spiritual domain. As Justice Black explained in *Everson*:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one

> religion, aid all religions, or prefer one religion over another. . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

330 U.S. at 15-16, 67 S.Ct. 504; *see also Lee*, 505 U.S. at 602, 112 S.Ct. 2649 (Blackmun, J., joined by Stevens & O'Connor, JJ., concurring) (noting that the modern Court " 'has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof' ") (quoting *School Dist. v. Schempp*, 374 U.S. 203, 222, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963)).

In *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962), this broadly proscriptive reading of the Establishment Clause was applied for the first time to the particularly sensitive area of school prayer. The controversy concerned a short prayer selected by the State Board of Regents for students to read aloud at the beginning of the school day.[6] Stating that "[n]either the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause," the Supreme Court struck it down as an unconstitutional attempt by the State to use "the power, prestige and financial support of government" to

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[6] The prayer read in full: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." 370 U.S. at 422, 82 S.Ct. 1261.

exert "indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion." *Engel*, 370 U.S. at 430-31, 82 S.Ct. 1261. But for today's majority, not to worry.

B

Yet *Lee*, the most recent and relevant precedent, continues to maintain and extends this broadly proscriptive reading of the Clause, and refutes the notion that a government-sponsored, "nonsectarian, nonproselytizing" prayer might be any less constitutionally deficient than a sectarian, proselytizing one. Addressing the almost identical contention in that case – that the invocation at issue was constitutionally sound because the school directed it to be nonsectarian and nonproselytizing – the Court stated:

> We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit reference to the God of Israel, or to Jesus Christ, or to a patron saint. There may be some support, as an empirical observation, to the statement . . . that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not. If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. . . . Though the efforts of the school officials in this case to find common

> ground appear to have been a good-faith attempt to recognize the common aspects of religions and not the divisive ones, our precedents . . . caution us to measure the idea of a civic religion against the central meaning of the Religion Clauses of the First Amendment, which is that all creeds must be tolerated and none favored. *The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.*

505 U.S. at 589-90, 112 S.Ct. 2649 (emphasis added). Today's majority opinion lacks any attempt to address this authoritative reasoning, which seems to be so at odds with its holding.[7] However, like boys on a summer night blithely whistling as they walk through a graveyard, for the panel majority it is not to worry so long as it is brave enough to look straight ahead and pretend that authoritative precedents are merely ghosts of the past not to be feared.

Indeed, the majority's opinion reveals a willful aversion to accommodating the respective reasoning of *Lee* and *Clear Creek II*. *See, e.g.*, ante at 821 (finding that the district court judge "clearly err[ed]" in defining nonsectarian to include reference to "specific deities" when *Clear Creek II*, 977 F.2d at 967, upheld a policy under which students may "employ the name of any deity"); ante at

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[7] Baffling indeed is the majority's "cf." citation, ante at 817, to pages 588-90 of *Lee*. In those pages, the Court explicitly rejects the idea that the nonsectarian nature of a prayer mitigates any Establishment Clause problems.

818 (relying on another circuit's case that expressly disagreed with our own *Clear Creek II* precedent, and doing so in the midst of explaining why the reasoning of *Clear Creek II* could not possibly rest on the fact that the policy created a limited public forum); ante at 821 n.11 (describing *Clear Creek II* as a case taking our First Amendment jurisprudence one step closer to the brink of a cliff); ante at 815 (feigning "obeisance to the ineluctable precedent of *Clear Creek II*"). To avoid the real issues presented in this case, the majority must paper over the unmistakable language in cases like *Lee* and *Engel*. It is beyond argument, however, that the Supreme Court's consistent interpretation of the Establishment Clause allows no exception for the nonsectarian and nonproselytizing prayer. The Clause prohibits the establishment of religion and, as interpreted by the Supreme Court, it denies government the ability to favor a composite ecumenical religion just as surely as it denies the ability to favor some select one of its components. The majority's contention that the words "nonsectarian, nonproselytizing" could somehow save an otherwise unconstitutional policy in this case is a regrettable expediency.[8]

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[8] And despite any implications in *Clear Creek II* to the contrary. Although we did note in *Clear Creek II* that having a nonsectarian, nonproselytizing requirement might serve to "minimize any . . . advancement of religion," the argument was clearly cumulative in nature. *See id.*, 977 F.2d at 967. Furthermore, the point was made exclusively in the context of one prong of the *Lemon* test. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). Although the Supreme Court has yet specifically to overrule *Lemon*, *see Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 & n.7, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993), a strict application

III

Furthermore, the inclusion of a "nonsectarian, non-proselytizing" content limitation offends a particularly

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of the case is of doubtful continuing relevance in this context, having been largely abandoned in favor of the "coercion" and "endorsement" tests of *Lee* and *Allegheny*.

In *Lee*, for example, the Court struck down the graduation prayer policy at issue on the sole basis that it was an unconstitutional coercion of participation in a religious exercise. *See id.*, 505 U.S. at 599, 112 S.Ct. 2649. Two concurrences would have found an unconstitutional endorsement as well, *see id.* at 604-05, 112 S.Ct. 2649 (Blackmun, J., joined by Stevens & O'Connor, JJ., concurring); *id.* at 630-31, 112 S.Ct. 2649 (Souter, J., joined by Stevens & O'Connor, JJ., concurring), but only three Justices, O'Connor, Stevens, and the since-departed Justice Blackmun, bothered to so much as recite the elements of the *Lemon* test. *See id.* at 602-03 & n.4, 91 S.Ct. 2105. Even this limited acknowledgment was ambivalent, however, as the discussion that followed addressed the sole question whether the government " 'plac[ed] its official stamp of approval' on the prayer" – and that is just the endorsement test rephrased. *See id.* at 603, 91 S.Ct. 2105 (quoting *Engel*, 370 U.S. at 429, 82 S.Ct. 1261). The dissenters in *Lee* would have found no constitutional fault at all based on a historical/coercion approach to the problem, *see id.* at 632-46, 112 S.Ct. 2649 (Scalia, J., joined by Rehnquist, CJ., and White & Thomas, JJ., dissenting), which prompted Justice Scalia to declare that "[t]he Court today demonstrates the irrelevance of *Lemon* by essentially ignoring it . . . and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision." *Id.* at 644, 91 S.Ct. 2105. *See also Rosenberger*, 515 U.S. at 837-46, 115 S.Ct. 2510 (omitting any mention of *Lemon* whatsoever when analyzing an Establishment Clause challenge).

Even before *Lee*, however, *Lemon* had long since been pushed into a small corner of the Court's jurisprudence. In both *County of Allegheny v. ACLU*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989), and *Board of Educ. of Westside Community*

longstanding and independent constitutional doctrine upon which the *Clear Creek II* decision must and does rely: the principle of neutral accommodation.

Schools v. Mergens, 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990), the Court's two most significant Establishment Clause cases leading up to *Lee*, the *Lemon* test failed to command a majority. As in *Lee*, the primary analysis of each majority, plurality, concurring, and dissenting opinion in those cases ultimately turned on the principles of endorsement and/or coercion – not on any strict application of the *Lemon* test. *See Allegheny*, 492 U.S. at 593-94, 109 S.Ct. 3086 (stating that "[w]hether the key word is 'endorsement,' 'favoritism,' or 'promotion,' the essential principle remains the same . . . [t]he Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief"); *id.* at 627, 109 S.Ct. 3086 (O'Connor, J., joined in part by Brennan & Stevens, JJ., concurring in part and in the judgment) (stating that "the endorsement test captures the essential command of the Establishment Clause"); *id.* at 638, 109 S.Ct. 3086 (Brennan, J., joined by Marshall & Stevens, JJ., concurring in part and dissenting in part) (agreeing that the Establishment Clause should be interpreted to assure that government neither "signals an endorsement of" nor "shows favoritism towards" religion); *id.* at 650, 109 S.Ct. 3086 (Stevens, J., joined by Brennan & Marshall, JJ., concurring in part and dissenting in part) (noting that "[w]hether the vice . . . is characterized as 'coercion,' or 'endorsement,' or merely as state action with the purpose and effect of providing support for specific faiths, it is common ground that . . . symbolic government speech 'respecting an establishment of religion' may violate the Constitution") (citations omitted); *id.* at 655-79, 109 S.Ct. 3086 (Kennedy, J., joined by Rehnquist, CJ., and White & Scalia, JJ., concurring in the judgment in part and dissenting in part) (advancing the coercion test); *Mergens*, 496 U.S. at 250, 110 S.Ct. 2356 (finding the Equal Access Act, 20 U.S.C. § 4071 et seq., constitutional because "secondary students are . . . likely to

A

In *Everson*, Justice Black expressly noted that the courts must "be sure that [they] do not inadvertently

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understand that a school does not endorse or support student [religious] speech that it merely permits on a nondiscriminatory basis"); *id.* at 260-61, 110 S.Ct. 2356 (Kennedy, J., joined by Scalia, J., concurring in part and in the judgment) (finding the Act constitutional on the basis that "[n]othing on the face of the Act or in the facts of the case . . . demonstrates that enforcement of the statute will result in the coercion of any student to participate in a religious activity"); *id.* at 266, 110 S.Ct. 2356 (Marshall, J., joined by Brennan, J., concurring in the judgment) (noting concern for the "appearance of school endorsement" of religious views caused by the procedures permitted under the Act); *id.* at 287, 110 S.Ct. 2356 (Stevens, J., dissenting) (not reaching the constitutional issue, but noting endorsement and coercion concerns).

Finally, Justice Scalia's assessment of *Lee*'s effect on *Lemon* has been sanctioned by another (post-*Lamb's Chapel*) panel of this court. *See Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 n.7 (5th Cir. 1993) (eschewing "*Lemon* analysis in favor of a more case-bound approach" because, although normally " 'it is neither [this court's] object nor [its] place to opine whether the Court's Establishment Clause jurisprudence is good, fair, or useful,' . . . recent indications suggest that the Court agrees with [a terminal] assessment of *Lemon*, essentially ignoring it in *Lee* in favor of the school prayer cases") (quoting *Jones*, 977 F.2d at 966, and citing to Justice Scalia's dissent in *Lee*); *see also Bauchman v. West High School*, 132 F.3d 542, 551-52 (10th Cir. 1997) ("Justice O'Connor's 'endorsement test' is now widely accepted as the controlling analytical framework for evaluating Establishment Clause claims."), *cert. denied*, ___ U.S. ___, 118 S.Ct. 2370, 141 L.Ed.2d 738 (1998); *but see Helms v. Picard*, 151 F.3d 347, 362 (5th Cir. 1998) ("[T]he Supreme Court has not abandoned, nor even fundamentally changed, the *Lemon* test."), *amended* 165 F.3d 311 (5th Cir. 1999).

prohibit [government] from extending its general . . . benefits to all . . . citizens without regard to their religious belief" by being overzealous in their enforcement of the Establishment Clause. 330 U.S. at 16, 67 S.Ct. 504. This concern was explicated with some eloquence by Justice Douglas in the following case of *Zorach v. Clauson*, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952):

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal

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Even if the Supreme Court has not yet effectively abandoned the *Lemon* test, the majority's insistence that schools bar sectarian and proselytizing prayers would surely fail *Lemon*'s excessive entanglement test. *Compare, Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d at 279 (to the extent that a statute requires school officials to review the content of prayers to ensure that they meet nonsectarian and nonproselytizing requirements, that statute excessively entangles government with religion); *Lee*, 505 U.S. at 617, 112 S.Ct. 2649 (Souter, J., concurring) (describing as "undefinable" the point at which a state-approved, ecumenical prayer becomes so closely identified with the sacred text of a specific religion that a breach of the Establishment Clause has occurred); *and Widmar v. Vincent*, 454 U.S. 263, 272 n.11, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (finding that a university would entangle itself with religion by attempting to exclude "religious speech" because enforcing that exclusion would require officials to distinguish between religious and nonreligious speech); *with Clear Creek II*, 977 F.2d at 968 (stating that "we know of no authority that holds yearly review of unsolicited material for sectarianism and proselytization to constitute excessive entanglement").

> of its adherents and the appeal of its dogma. When the state . . . cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

343 U.S. at 313-14, 72 S.Ct. 679; *see also Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973) (stating that "[a] proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of neutrality toward religion"); *Wallace v. Jaffree*, 472 U.S. 38, 60, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (interpreting the Clause, similarly, as requiring government to "pursue a course of complete neutrality toward religion").

Adapting this "neutral accommodation" principle to the scholastic setting, in *Widmar v. Vincent*, 454 U.S. 263, 273-74, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), the Court

held that it was not a violation of the Establishment Clause for a public university to allow a religious student group to take advantage of the university's general policy of allowing registered student groups to use university facilities for their meetings on a neutral and nondiscriminatory basis. Reasoning that the university had created a designated public forum by making the facilities "generally open for use by student groups," the Court clarified that, in general, "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices" that make use of the forum. *Id.* at 267, 274, 102 S.Ct. 269.

Following up on *Widmar*, in 1984, Congress enacted the Equal Access Act, 20 U.S.C. § 4071 et seq., to make the neutral accommodation principle expressly applicable to the secondary public schools. Upholding the Act as constitutional under the Establishment Clause, the Court noted in *Mergens* that:

> [T]here is a crucial distinction between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support [religious] student speech that it merely permits on a nondiscriminatory basis. The proposition that schools do not endorse everything they fail to censor is not complicated.

496 U.S. at 250, 110 S.Ct. 2356 (citations omitted). The majority fails to appreciate this "crucial distinction"

between government speech endorsing religion and private speech endorsing religion when it reads *Clear Creek II* as requiring school policies to adopt the nonsectarian, nonproselytizing requirements.

B

This distinction was not lost on the *Clear Creek II* panel. *Clear Creek II* is indeed a case about neutral accommodation, and relies on a central principle of Establishment Clause jurisprudence.[9] In upholding the policy

[9] This principle of neutral accommodation is fully consistent with and anticipated by *Lee*, *see id.*, 505 U.S. at 598-99, 112 S.Ct. 2649 ("We recognize that, at graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students.") (citing *Mergens*); *id.* at 630 n.8, 112 S.Ct. 2649 (Souter, J., joined by Stevens & O'Connor, JJ., concurring) ("If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement to the State."), and has been both sustained and augmented by the Court's more recent cases. *See, e.g.*, *Rosenberger*, 515 U.S. at 842, 115 S.Ct. 2510 (stating, once again, that "[i]t does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups which use meeting rooms for sectarian activities"); *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 766, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (plurality) ("Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms."); *Board of Education v. Grumet*, 512 U.S. 687, 696, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994) (" 'A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of neutrality toward religion,' favoring neither one religion over others nor religious adherents collectively over nonadherents.") (quoting *Nyquist*, 413 U.S. at 792-93, 93 S.Ct. 2955); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993) (noting that "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge," for, if the reverse were true, "then 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair' ") (quoting *Widmar*, 454 U.S. at 274-75, 102 S.Ct. 269).

under consideration in *Clear Creek II*, we expressly noted that, "unlike the policy at issue in *Lee*, [the *Clear Creek II* policy] does not mandate a prayer." 977 F.2d at 968. Although conceding that the policy allows for "supplications to a deity," we clarified that it also "permits invocations free of all religious content." *Id.* at 969.[10] Relying expressly on *Mergens*'s proposition that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect," we concluded that the

[10] On this point, it is important to note that *Clear Creek II* clearly rests on an interpretation of "invocation" and "benediction" that is itself free of all religious content. *Clear Creek II*, 977 F.2d at 969. This fact goes some way towards distinguishing the result in *Clear Creek II* from the contrary decision of the Third Circuit in *ACLU v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (en banc), where the challenged policy provided for a student-elected, student-given, "invocation and benediction *prayer*." *Id.* at 1475 (emphasis added).

policy was an essentially neutral directive of accommodation for private religious and other speech that neither favored nor disfavored religion on its face, and was therefore not unconstitutional. *Id.*

C

Because it is clear that *Clear Creek II* relies on *Mergens*'s neutral accommodation principle to escape the proscriptive effect of *Lee*, we need only apply that principle to the facts before us.

1

We have expressly stated that for the Constitution to require neutral accommodation of religious speech, the government must have established at least what has been called a "limited public forum." *Duncanville*, 994 F.2d at 164-65.[11] As the majority points out, a "limited public forum" is one of several types of fora recognized by the Supreme Court. The other categories of fora include traditional public, designated public, and nonpublic fora. The majority errs, however, by failing to understand the difference between a "designated public forum" and a "limited public forum." The government creates a designated public forum when it "has intentionally designated a place or means of communication as a public forum." *Cornelius*, 473 U.S. at 800, 105 S.Ct. 3439. A subset of

[11] *But see Lamb's Chapel*, 508 U.S. at 392-93, 113 S.Ct. 2141 (suggesting, prior to our decision in *Duncanville*, that even in a nonpublic forum, the neutral accommodation principle applies).

designated public fora is the "limited public forum." Such a forum is created when the government limits the purpose of the forum by, for example, placing a limitation on use by certain groups or on the discussion of certain subjects. *Perry*, 460 U.S. at 45 n.7, 103 S.Ct. 948; *Brody v. Spang*, 957 F.2d 1108, 1118 (3d Cir. 1992) (describing a limited public forum as "a subset type of forum, whose scope is circumscribed either by subject matter or category of speaker"); *Travis v. Owego-Apalachin School Dist.*, 927 F.2d 688, 692 (2d Cir. 1991) (describing a limited public forum as a sub-category of the designated forum that the government creates when it opens a nonpublic forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects).

SFISD's policy only limits the benedictions or invocations by limiting the potential class of speakers to graduating students. Contrary to the majority's assertion, the policy in this facial challenge does not require that the messages have a religious component. Neither the dictionary definitions cited by the majority, ante at 819-820, nor our own precedents require an interpretation of "invocation" or "benediction" grounded in religion. *See Clear Creek II*, 977 F.2d at 969 (interpreting the terms "invocation" and "benediction" in a way that is free from all religious content). Furthermore, SFISD's policy grants absolute access to the graduation podium to any student speaker that the senior class elects; once the class of elected student speakers is chosen, SFISD maintains no power, discretionary or otherwise, to bar any duly chosen speaker from accomplishing his task. Because the policy effectuates this relinquishment of control, the policy

unmistakably creates a limited public forum and the majority cannot make it otherwise.

In arguing that SFISD has not created a "true" forum, the majority states its *ex cathedra* view that a graduation ceremony is not an appropriate place for communication of views on issues of political and social significance. Ante at 819. Historical facts, of course, contradict the majority's view. While graduation ceremonies do not often exhibit "duelling presentations," they almost always include speakers attempting to impart wisdom and reflect on life's higher (that is, morally superior) goals. Furthermore, graduation ceremonies often play host to controversial public figures. *See, e.g.*, Lydia Lum, *Commencement Time Begins as Politicians Head List of Speakers*, HOUSTON CHRONICLE, May 4, 1998, at 16 (stating that "commencement speakers . . . vary from year to year, but 1998 apparently is the Year of the Politician."). Finally, our country's public schools have, of course, a long tradition of hosting religious prayers at graduation ceremonies. *Lee*, 505 U.S. at 635-36, 112 S.Ct. 2649 (Scalia, J., dissenting). In sum, graduation ceremonies have often presented a forum for expressing the most profound of thoughts on society, politics, religion, and the nature of humankind.[12]

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[12] The majority cites only one case in support of its rigid view that a graduation ceremony (or portions thereof) could not constitute a public forum. In its citation of, and quotation from, that case the majority takes more liberties than should be allowable. In quoting *Brody v. Spang*, the majority panhandles a remote district court's musings as Third Circuit law without proper attribution. The quotation reads,

> Graduation ceremonies have never served as forums for public debate or discussions, or as a forum through which to allow varying groups to voice their views.

Ante at 819 (quoting *Brody v. Spang*, 957 F.2d 1108, 1119-20 (3d Cir. 1992) (quoting *Lundberg v. West Monona Community Sch. Dist.*, 731 F. Supp. 331 (N.D. Iowa 1989)). But the *Brody* court did not indicate any agreement in quoting the Iowa district court. In fact, the *Brody* court followed its discussion of *Lundberg* with the following statement:

> Nonetheless, it is certainly possible that the commencement exercises at Downingtown Senior High School could qualify as a public forum, and nothing in the present record demonstrates otherwise. More specifically, although the terms of the consent decree [at issue in this case] suggest that the pool of potential graduation speakers is confined to members of the school community and invited guests, this simply indicates that any forum created is a limited one, and does not preclude a finding that the ceremony has been designated as a public forum.

Brody, 957 F.2d at 1120 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988)).

Besides its failure to properly distinguish between designated and limited public fora, the majority further errs by applying precedent that is inapplicable to the case at hand. The cases upon which the majority relies for guidance in its forum analysis – *Cornelius, Perry, Forbes, Estiverne, Muir* and *Hobbs* – all dealt with "as-applied" challenges in which the defendants (governmental entities) applied their policies to bar forum access to those wishing to express the ideas that the plaintiffs sought to communicate. Here, in this facial challenge, SFISD has not applied its policy to bar anyone or any expression. Instead, its policy invites expression, restricted only by time, place, and manner.

Here, we address a *facial challenge* to a policy under which the school district argues that it has indeed established a public forum. A facial challenge requires that we must not condemn the policy unless there is no way to implement it in a constitutional manner. *Clear Creek II*, 977 F.2d at 969; *cf. United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."); *see also Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 836 & n.6 (9th Cir. 1998) (refusing to view a school district's intentions skeptically when analyzing a facial challenge to a graduation policy). The difference between facial challenges and "as-applied" challenges is critically important, and yet the majority has erroneously decided to treat them identically. This error, in turn, causes the majority to stumble through the inappropriate process of applying forum tests and factors wholly inapplicable in the context of this appeal. *See, e.g.*, ante at 819-19 (attempting to apply the factor of "governmental intent," but then stating that (in this facial challenge) "the government's proffered intent does not govern this inquiry"); ante at 819-820 (analyzing the "extent of the use granted" factor when the policy has never been implemented).[13]

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[13] As these citations reveal, the majority applies factors designed for use in analyzing "as-applied" challenges to government restrictions on speech when the plaintiff has brought a facial challenge to a policy not yet implemented.

But the SFISD policy clearly survives a facial challenge. When a policy creating a forum places no barriers other than reasonable time, place, and manner restrictions on the speech, that policy creates a public forum.[14] As already stated, the SFISD policy only limits the class of potential speakers to graduating students; this lone restriction merely requires us to characterize the forum as a "limited" public forum.

2

Even if the SFISD policy did not create a limited public forum, the majority's decision to accept ecumenical prayers while barring other prayers contradicts established First Amendment law. Once the government creates a forum – whether a traditional public forum, a limited public forum, or even a nonpublic forum – and lets in some religious viewpoint, the government may not then exclude any other religious viewpoint. In other words, the government must *neutrally accommodate* all religious viewpoints once any one religious viewpoint (e.g., an ecumenical viewpoint) has entered the forum.

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[14] *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) ("[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided [that] the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.' ") (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)).

This result is dictated by the Supreme Court's consistent rule that even in nonpublic fora, the government may not engage in viewpoint discrimination. *See Perry*, 460 U.S. at 46, 103 S.Ct. 948 (government may not discriminate based on viewpoint in even a nonpublic forum); *Cornelius*, 473 U.S. at 806, 105 S.Ct. 3439 ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum *and are viewpoint neutral.*") (emphasis added and citation omitted); *Hobbs v. Hawkins*, 968 F.2d 471, 481 (5th Cir. 1992) ("viewpoint discrimination violates the First Amendment regardless of the forum's classification"). Of utmost importance to the instant case, the Supreme Court has applied this hard and fast rule in the realm of religious speech. In the midst of chastising a school district's decision to exclude a religious group from using school premises solely because of the group's religious viewpoint, the Supreme Court stated that

> denial on that basis was plainly invalid under our holding in *Cornelius* that although a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers for whose especial benefit the forum was created . . . , the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

Lamb's Chapel, 508 U.S. at 394, 113 S.Ct. 2141 (quotation marks and citations omitted; placement of ellipses in original). It is not surprising that the Supreme Court has

applied this prohibition against viewpoint restriction to religious speech. The Court has stated in graphic and certain terms that the First Amendment's Free Speech Clause fully applies to religious speech:

> Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private religion. Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing, or even acts of worship.

Pinette, 515 U.S. at 760, 115 S.Ct. 2440 (citations omitted).

In sum, even if we assume that the graduation policy creates only a nonpublic forum, the government may place some reasonable restrictions on the speech but it most assuredly cannot restrict speech because of its viewpoint. Thus, the majority creates a subset of constitutional violations when it allows the school district to create a forum where students can offer ecumenical prayers, but not the prayers of any other religion.[15] *See American Civil*

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[15] *Lamb's Chapel* and *Pinette* positively suggest that a "nonsectarian, nonproselytizing" content limitation is itself unconstitutional in this setting. *See Lamb's Chapel*, 508 U.S. at 394, 113 S.Ct. 2141 (noting that " 'government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses,' " and holding that a requirement of no religious content constitutes such an impermissible viewpoint restriction) (quoting *Cornelius*, 473

Liberties Union v. Black Horse Pike Regional Bd. of Educ., 84 F.3d 1471, 1492 (3d Cir. 1996) (Mansmann, J., dissenting) (contrasting the *Clear Creek II* policy with another policy that "is more liberal in that it extends the scope of its toleration to include even sectarian prayer, if the graduates so choose," and concluding that the latter policy "comports with the First Amendment's prohibition against the inhibition of the practice of religion or of free expression"). Whatever criticisms one may make of the reasoning in *Clear Creek II*,[16] there can be no contention

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U.S. at 806, 105 S.Ct. 3439); *Pinette*, 515 U.S. at 766, 115 S.Ct. 2440 (stating that "giving sectarian religious speech preferential access to a forum . . . would violate the . . . Free Speech Clause, since it would involve a content limitation," and thereby implying that the reverse would also be true). Although *Clear Creek II* clearly held that a "nonsectarian, nonproselytizing" content limitation was constitutionally permissible in the context of a limited public forum, *see Clear Creek II*, 977 F.2d at 967 & 971, *Lamb's Chapel* and *Pinette* are subsequent decisions of the Supreme Court, so it would appear that this holding has been overruled.

[16] Although the question is not before us, courts and commentators have criticized the idea that an *elected* class could qualify either as "religion neutral" or even as a proper class for public forum and *Mergens* purposes. *See, e.g., Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 834 n.7 (9th Cir. 1998) (finding selection by grade point a superior method in this regard); *Black Horse*, 84 F.3d at 1477-78; *Recent Case*, 110 Harv. L. Rev. 781, 783-84 (1997); Rick A. Swanson, *Time for a Change: Analyzing Graduation Invocations and Benedictions under Religiously Neutral Principles of the Public Forum*, 26 U. Mem. L. Rev. 1405, 1422-25, 1432-33 & n.95 (1996); *cf. Widmar*, 454 U.S. at 275, 102 S.Ct. 269 (making explicit exception for the situation where "empirical evidence [shows] that religious groups will dominate the forum"); *Pinette*, 515 U.S. at 766, 115 S.Ct. 2440 (noting that "one can conceive of a[n unconstitutional] case in which the

that a content limitation would in any way improve the situation. It is therefore clear to me that the district court erred in requiring SFISD to incorporate these additional restrictions into their policy.

IV

Now we come to the remarkable holding of the majority that, for the most curious reasons, the First Amendment allows speech at graduation ceremonies but bars speech at sporting events. In short, there is a total absence of merit to the contention that the Football Policy might be constitutionally deficient when the graduation policy is not.[17] As I have tried to explain, the reason a

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governmental entity manipulates its administration of the public forum in such a manner that only certain religious groups take advantage of it"); *Clear Creek II*, 977 F.2d at 969 (stating that "[w]e can imagine discriminatory methods of implementing the [policy] that would make it a tool for governmental endorsement of religion").

[17] The Football Policy states:

> The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.
>
> Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the

Clear Creek II policy works is that it neutrally accommodates both religious and nonreligious speech in a limited public forum. Constitutionally speaking, there are no location or other restrictions on where the state may elect to create its designated or limited public fora, *see Estiverne*, 863 F.2d at 376. It follows therefore that if the school policy at issue facially creates a limited public forum, that policy (here, the Football Policy) necessarily passes constitutional muster to allow the designated class of speakers to engage in both religious and non-religious speech. *But see Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (11th Cir. 1989) (finding "equal access" policy for football game invocations unconstitutional, but without reference to public forum analysis and in the apparent assumption that the "invocations" at issue were certain to be religious in content).

On the other hand, the majority, which apparently feels measurable discomfort with our precedent, takes the Football Policy as an opportunity to break free from the constraints of *Clear Creek II*, and argues that, unlike graduation ceremonies, football games lack solemnity, which,

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> statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

Like the graduation policy, the Football Policy contains a fallback provision that goes into effect if a court enjoins the enforcement of the primary policy provisions. If this occurs, the policy goes into effect with the following sentence added to the last paragraph:

> Any message and/or invocation delivered by a student must be nonsectarian and nonproselytizing.

the majority concludes, undermines any legitimate reasons for the policy's application to such sporting events.[18] It may well be headline news to the majority, but a "solemn" ceremony is not the only occasion when many citizens feel the need for serious thoughts and words. Of course, football games do not possess the solemnity of a graduation ceremony. But that fact has all the relevance to our First Amendment discussion today as the fact that a hog was slaughtered to make SFISD's football. There are in fact several secular reasons for allowing a brief, serious message before football games – some of which SFISD has listed in its policy. At sporting events, messages and/or invocations can promote, among other things, honest and fair play, clean competition, individual challenge to be one's best, importance of team work, and many more goals that the majority could conceive would it only pause to do so.

Having again relinquished all editorial control, SFISD has created a limited public forum for the students to give brief statements or prayers concerning the value of those goals and the methods for achieving them. As with the graduation messages, there will be no "dueling debates." But make no mistake, whatever the subject – whether it be sportsmanship, the value of winning, the importance of safety, etc. – students will have different views on the subjects to be expressed. Because the SFISD

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[18] The majority also claims to find support in *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995), for striking the Football Policy. But *Duncanville* was an entirely different case, involving private prayers among team members – not "public" prayers or messages in any sense.

policy does nothing to discriminate based on viewpoint, and certainly does not direct any particular viewpoint (religious or secular), the primary SFISD Football Policy does not violate the First Amendment.

V

Our court's dalliance in prayer-writing will not, unfortunately, end with this case. Now that we have required prayers to be nonsectarian and nonproselytizing in content, we undoubtedly will have to give definition to those terms. This will prove no easy task. In *Lee*, the rabbi's benediction read in part:

> The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.

As Justice Blackmun pointed out, the last sentence of this excerpt includes a direct quotation of Judeo-Christian scripture.[19] *Lee*, 505 U.S. at 604, n.5, 112 S.Ct. 2649 (Blackmun, J., concurring). Because the Court refused to find that the nonsectarian nature of a prayer could save it from Establishment Clause scrutiny, the Court did not need to decide whether this oration qualifies as nonsectarian or nonproselytizing. Our court will have to decide

[19] The quote is from the Book of the Prophet Micah, ch. 6, v. 8 ("He has showed you, O man, what is good. And what does the Lord require of you? To act justly and to love mercy and to walk humbly with your God.").

such issues.[20] If the prayer calls upon "Father" instead of "God," will we intervene? (Must the invocation be gender-neutral?) *See Chaudhuri v. Tennessee*, 130 F.3d 232, 241 n.2 (6th Cir. 1997) (Jones, J., concurring and dissenting) (noting that the supplication to " 'Heavenly Father' contains a package of religious bias"), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1308, 140 L.Ed.2d 473 (1998). If a student begins his benediction message by saying, "Blessed be He who decked the sky with constellations and set in it a lamp and a shining moon"[21] will we characterize this direct quotation of the Koran as sectarian and proselytizing? Our court's evolving prayer control will fashion the standard utterance at high school graduations throughout our Circuit: as students grope for a lawful way to express their most deeply held beliefs, on one of the most ceremonious days in their young lives, they will offer up the Fifth Circuit Court of Appeals's prayer.

The majority fails to realize that what is at issue in this *facial challenge* to this school policy is the neutral accommodation of non-coerced, private, religious speech, which allows students, selected by students, to express their personal viewpoints. The state is not involved. The school board has neither scripted, supervised, endorsed, suggested, nor edited these personal viewpoints. Yet the majority imposes a judicial curse upon sectarian religious

[20] *Cf. Rosenberger*, 515 U.S. at 835, 115 S.Ct. 2510 ("The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them.").

[21] The Koran, Al-Furqan 25:63, at 256 (N.J. Dawood trans., Penguin Books 1997).

speech. Because I believe that this result is at war with three clauses within the First Amendment, I respectfully dissent.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-40150

JANE DOE, Individually and as next of friend for her minor children,
Jane and John Doe, Minor Children;
JANE DOE #2, Individually and as next of friend for her minor child,
John Doe, Minor Child, and John Doe, Individually,

Plaintiffs-Appellees-Cross Appellants,

versus

SANTA FE INDEPENDENT SCHOOL DISTRICT, ET AL.,

Defendants,

SANTA FE INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellant-Cross Appellee.

Appeals from the United States District Court for the Southern District of Texas

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Before JOLLY*, WIENER, and STEWART, Circuit Judges.

PER CURIAM:

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* Judge Jolly's opinion dissenting from the court's refusal to grant rehearing en banc is filed herewith.

The Petition for Rehearing is denied, and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

DISSENTING OPINION

E. GRADY JOLLY, Circuit Judge, with whom PATRICK E. HIGGINBOTHAM, EDITH H. JONES, JERRY E. SMITH, RHESA HAWKINS BARKSDALE, EMILIO M. GARZA, and HAROLD R. DeMOSS, Circuit Judges, join, dissenting:

I respectfully dissent from the court's denial of the petition for en banc hearing.

Every judge on this court must surely know that the policy announced by the majority of the panel – permitting students' ecumenical religious prayers or speech, but excluding all other religious prayers or speech by students – is unconstitutional. Yet a majority of this court has voted against an *en banc* proceeding to correct constitutional error. With great respect for each of these judges who is unwilling to step up to bat, I must say to them that we fail our constitutional and professional duty when we shy away from attempting to straighten out our muddled jurisprudence. The judges who voted against *en banc* are certainly not to be faulted for disagreeing with the viewpoint expressed in the dissent to the panel opinion – it may be a correct view of the case or it may not. But for the reasons that are pointed out in the panel dissent, the majority is surely, surely wrong in fundamental ways,

and yet the majority of the judges on our court wish to remain silent on an issue of great importance – and great confusion – in the circuit. With due respect, I regret their choice.

The majority opinion in *Santa Fe* appears to be a conscious decision, not merely to refuse to follow Supreme Court precedent, but to abdicate its duty to provide reasons for not following that precedent. The majority finds that the First Amendment allows ecumenical religious speech, but then somehow concludes – under the very same conditions – that the First Amendment prohibits religious speech expressing any other viewpoint. *See Doe v. Santa Fe Independent School Dist.*, 168 F.3d 806, 824 (5th Cir. 1999) ("the words 'nonsectarian, nonproselytizing' are constitutionally necessary components"). The majority acknowledges that this ruling endorses viewpoint discrimination.

Yet the fact that the Supreme Court has repeatedly stated that the government cannot engage in viewpoint discrimination when it creates any kind of a forum – even a nonpublic forum – does not give the majority pause. *See, e.g., Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985) ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn . . . are viewpoint neutral."); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). The Supreme Court has specifically recognized – after our opinion in *Clear Creek II* – that this Free Speech Clause prohibition operates in the realm of religious speech. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394,

113 S.Ct. 2141, 124 L.Ed.2d 352 (1993). The panel majority's response to these admonitions? Silence. Now, because we decline to take this case en banc, our full court responds in silence as well. This silence is inexplicable in the light of the Supreme Court's recent statement that "[t]he first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 835, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (concluding that the state unconstitutionally excluded a religious viewpoint from general funding of student publications). The danger lurks just as ominously when the State exercises this power over students' speech, and this court greatly enhances the danger when it – an institution insulated from democratic restraints – refuses to explain why it allocates this power to the State in the face of contrary Supreme Court precedent.

The *Santa Fe* majority also casts our Circuit's Establishment Clause jurisprudence into throes of uncertainty. The majority opinions in *Santa Fe* and *Jones v. Clear Creek Independent Sch. Dist.*, 977 F.2d 963 (5th Cir.1992), are so clearly in conflict with each other that school districts within our jurisdiction will have no guidance on how to interpret our confused precedent.

The *Santa Fe* opinion conflicts with *Clear Creek II* in multiple ways – each important, and each without any explanation by the *Santa Fe* majority. First, and perhaps most puzzling, is the *Santa Fe* majority's holding that the Establishment Clause will not allow students to mention specific deities in their graduation messages, *Santa Fe*, 168

F.3d at 827, when in *Clear Creek II*, our court upheld a policy that allowed students to "employ the name of any deity." *Clear Creek II*, 977 F.2d at 967; *see also id.* at 969 ("invocations permitted by the Resolution 'may' include supplication to a deity"). The *Santa Fe* majority makes no effort to explain away its stark departure from our precedent. School districts are left to wonder whether they may allow students to state the name of Buddha, Jesus, Jehovah, or Mohammed in their graduation messages. Because *Clear Creek II* stands as prior precedent, school districts will be free to follow it, instead of the upstart rule announced in *Santa Fe*.

In yet another unexplained departure from *Clear Creek II*, the *Santa Fe* majority interpreted a policy allowing "invocations and/or benedictions" so as to allow only religious prayers. *Santa Fe*, 168 F.3d at 820 (students "will be chosen to deliver very circumscribed statements that under any definition are prayers"). The *Clear Creek II* panel also interpreted a policy allowing for "invocations and/or benedictions." That panel, however, held that the policy "permits invocations free of all religious content." *Clear Creek II*, 977 F.2d at 969. Yet again, there is no articulated authority to legitimize a holding that contradicts precedent.

Still another element of the jurisprudential quagmire following *Santa Fe* is the majority's decision to ignore the analytical approach that our precedent dictates when addressing a facial challenge to a school policy. In *Clear Creek II*, the panel recognized that because it was faced with a suit challenging the facial constitutionality of a school policy, the court must find that the policy "is constitutional unless there is no way to implement it on a

nondiscriminatory basis." *Clear Creek II*, 977 F.2d at 969. Without even so much as discussing the fact that the case presented a facial challenge to Santa Fe's policy, the *Santa Fe* majority assumed, for example, that the policy would restrict the number of student speakers to either one or two, and also assumed that the school would strictly limit the topics that the elected students could address. *Santa Fe*, 168 F.3d at 820. The majority assumed these "facts" even though the policy – and the record – is silent as to these hypothetical restrictions.

Santa Fe is not our Circuit's only case to hide from the analytical rule required by *Clear Creek II*. The panel in *Ingebretsen v. Jackson Public School Dist.*, 88 F.3d 274, 279 n. 2 (5th Cir.1996), also ignored the rule without mentioning *Clear Creek II*. In its refusal to differentiate between a facial and an "as-applied" Establishment Clause challenge, the *Ingebretsen* panel cited two Supreme Court decisions, handed down in the late Eighties, in a footnote. *Id.*, 88 F.3d at 279 n. 2. Given our decision in *Clear Creek II*, however, the *Ingebretsen* panel's opinion on this issue was a day late and a Supreme Court citation short of relying on legitimate authority. *See Barber v. Johnson*, 145 F.3d 234, 237 (5th Cir.1998) (stating the rule that in this circuit one panel may not overrule another prior panel absent intervening legislation, a decision by our *en banc* court, or a decision of the Supreme Court).

Upon reading *Santa Fe*, *Ingebretsen*, and *Clear Creek II*, it seems, with regard to the Establishment Clause, that panels of our court pay little regard to previous jurisprudence. One might think that a specific holding of a prior opinion is no more than a puff of wind. *Santa Fe* disregards *Clear Creek II* today. The next panel can disregard

Santa Fe tomorrow. When judges can pick and choose without the constraints imposed by precedent, the public is left stranded, vulnerable to liability, helplessly dependent on the panel it draws. We could fulfill our constitutional and professional duty to the public, vote this case *en banc*, and be of a single voice. But when our court refuses to rehear *en banc* cases such as *Santa Fe*, this unrestrained decision-making goes uncorrected. This failure to act, in turn, allows individual members of our court to continue to engage in an activity that has all the appearance of simply advancing personal philosophy.

For these reasons, I respectfully DISSENT from the denial of rehearing *en banc*.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JANE DOE, ET AL.	§	
	§	
VS.	§	CIVIL ACTION NO.
	§	G-95-176
SANTA FE	§	
INDEPENDENT	§	
SCHOOL DISTRICT	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause was originally filed on April 4, 1995. Plaintiffs, both parents and children acting under pseudonyms, asserted claims against both the Santa Fe Independent School District and various individual members of the Board of Trustees of the District. Plaintiffs alleged a number of specific violations of their Constitutional rights to be free from a state-sponsored religion in their educational environment, and sought injunctive relief as well as damages, attorney's fees and costs.

Pursuant thereto, the Court conducted an emergency hearing in this matter, and issued an Interim Order (Instr. #4), on May 10, 1995. Essentially, the Order established specific guidelines regarding the conducting of then pending commencement and related activities, insofar as religious activity was involved. Certain parties thereafter attempted to intervene in this case, and after a number of procedural machinations, the matter was placed before the United States Court of Appeals for the Fifth Circuit, who issued an Order modifying certain aspects of the

Court's Interim Order. Thereafter, although the School District had already substantially modified past, allegedly religious practices, the Court held a supplemental status conference, and a calendar was established for purposes of establishment of a permanent, First Amendment policy on the part of Defendant School District. Secondary to the establishment of that timetable, various stipulations and related documents were filed among the papers of this cause, setting out with some clarity the history of past alleged religious activities in the Santa Fe School District.

The parties were then invited to submit Motions for Summary Judgment and Responses thereto. Defendants filed their Motion, but Plaintiffs failed to do so, despite the established record of numerous actual stipulations which would have allowed for clear, factual resolution of the case. Plaintiffs did file an extensive opposition to Defendant's Motion for Summary Judgment. After careful consideration of all of the pleadings on file herein, together with the substantial evidentiary materials submitted in conjunction therewith, the Court, on June 4, 1996, entered an Order of Summary Judgment on Liability Issues (Instr. #29). That Order is adopted herein, and made a part hereof as if such had been set out in detail. On the basis of that ruling, the individual Defendants were dismissed from the case, and the Court set the matter for trial on damages issues, only, during July, 1996. During the period of July 25-26, 1996, a non-jury trial on the damages phase of this case was completed. Thereafter, both parties submitted Proposed Findings of Fact and Conclusions of Law, Trial Briefs and Proposed Judgments, as well as Plaintiffs' Application for Attorney's Fees,

together with supports, and Response thereto. On the basis of careful consideration of each and all of such pleadings, and all applicable law, together with the testimony elicited during the damages trial and representations of counsel, the Court herewith enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Plaintiffs filed suit on April 4, 1995, alleging that the Santa Fe Independent School District (District) had committed acts in violation of the Establishment Clause of the First Amendment. Although most of these allegations involved past practices, they requested injunctive and declaratory relief and sought money damages pursuant to 42 U.S.C. § 1983. The Plaintiffs sued the District and several administrators and school board members. The individual Defendants were dismissed from this suit before trial.

2. The District is a political subdivision of the State of Texas and is governed by an elected, seven-person Board of Trustees.

3. On February 16, 1996, the District moved for summary judgment on all claims. On June 4, 1996, the Court granted the District's motion with respect to the Plaintiffs' request for injunctive relief. However, the Court denied the District's motion with respect to other claims asserted in the motion and *sua sponte* entered an Order finding the District liable with respect to several *past* incidents or practices. The Court then scheduled a trial on damages. The Court's Order of June 4, 1996, also stated that any party that disagreed with the Court's

findings on matters of liability could present evidence at the trial on damages to contest those findings. The trial on damages was held on July 25 and 26, 1996. As the anonymity of all Plaintiffs was preserved through trial, they are herein referred to by pseudonyms throughout.

4. Janie Doe testified that she is a junior at Santa Fe High School. She testified that, during the seventh grade in the Spring semester of 1993, her history teacher, David Wilson, distributed a flier that advertised a religious revival.

5. The District's Board of Trustees maintains a written policy, Policy EMI (Defendant's Exhibit 1), which prohibits teachers from distributing religious materials to students.

6. During the same class period, David Wilson made several disparaging comments about Janie Doe's religion, Mormonism, including the statement that Mormonism is a "cult." Janie Doe testified that several classmates made comments to her such as "I don't know whether I should hang out with you anymore." Janie Doe testified that Mr. Wilson's and the other student's comments lasted about 10 minutes. Janie Doe testified that she told her mother that the statements made in class were upsetting. Janie Doe testified that the students "never" bothered her again after this incident.

7. Janie Doe testified that Mr. Wilson's comments were out of character for him and that no teacher in Santa Fe ISD, before or since, had ever made such comments to her.

8. Janie Doe's mother, Mrs. Jane Doe, testified that she spoke with the principal, Bob Brundrette, who told her he would investigate. Mr. Brundrette testified that he interviewed Mr. Wilson, who admitted to distributing the religious flier and making disparaging comments about Mormonism. Mr. Brundrette testified that he was appalled by Mr. Wilson's conduct. Mr. Brundrette asked Mrs. Doe what remedy she desired. She requested an apology from Mr. Wilson. Mr. Brundrette set up a meeting with Mr. Wilson and Mrs. Doe. Mr. Wilson later apologized in front of Mrs. Doe and in front of the class.

9. On April 8, 1993, Mr. Brundrette reprimanded Mr. Wilson in writing (Defendant's Ex. 23) for distributing the flier and for making the disparaging comments. Mr. Wilson was informed that his conduct violated Board Policy EMI. He was given directives about the District's expectations concerning his future conduct. Mr. Brundrette threatened Mr. Wilson with "severe disciplinary action" should Mr. Wilson violate the written directives.

10. Janie Doe testified that she could not think of anything else the principal could have done.

11. The Court finds that Mr. Brundrette's response to Mr. Wilson's behavior was prompt, sincere, and reasonably calculated to prevent future violations. The Court finds that Mr. Brundrette's testimony was credible and sincere.

12. Janie Doe testified that she received "good grades" before and after this incident.

13. When asked about damages, Janie Doe testified that money is not a "big deal" to her and that she did not know her lawyers were requesting damages on her behalf until her deposition. Even during her moving trial testimony, she was unable to quantify any actual loss.

14. Richard Ownby, the District's superintendent, testified that David Wilson's conduct violated written Board Policy DH (Defendant's Ex. 28 p. 3.) The policy states that teachers shall not expose students to disparagement.

15. There is no evidence that the District maintained a policy or practice of tolerating conduct similar to David Wilson's.

16. Given Janie Doe's testimony that Mr. Wilson's conduct was out of character for him, that no teacher before or since treated Janie Doe in such a manner, and that the District maintains written policies against religious activities in the classroom and against disparagement of students, the Court finds that it was not reasonably foreseeable to the District that Mr. Wilson would engage in the conduct about which Janie Doe has complained. Given the District's prompt corrective action, the Court finds that the District was not deliberately indifferent to Mr. Wilson's conduct. Therefore, no District policy or practice proximately caused injury to Janie Doe.

17. Janie Doe appeared to be a strong, intelligent and emotionally stable young woman. While the incident plainly and quite justifiably upset her, she presented no medical or psychological evidence of damages caused by

this distress. She testified to no specific discernible injury to her emotional state.

18. Jane Doe testified that, in May 1994, John Doe Jr., who was in the third grade, brought home a permission slip from his teacher, Theresa Locke, to learn a song in sign language called "In this Very Room."

19. The words to this song are "In this very room there's quite enough love for one like me (all of us, for all the world) and in this very room there's quite enough joy for one like me (all of us, for all the world) and there's quite enough hope and quite enough power to chase away any gloom, for Jesus, Lord Jesus is in this very room." (Plaintiff's Ex. 19.)

20. Jane Doe testified that this was the first and only time her son was asked to participate in the singing (or signing) of a religious song at the District.

21. Jane Doe spoke to the principal, Earl Routh, about this incident. Mr. Routh instructed the teacher to discontinue use of the song or to drop the last line of the song. The teacher discontinued use of the song. Mr. Routh also gave the teacher a directive about not leaving young students unsupervised. That same month, Mr. Routh reminded his staff about the District's policies prohibiting religious teaching/practices in the schools. The Court finds that Mr. Routh's testimony was credible and sincere.

22. Roney McCrary testified that he has been a member of the school board since 1990. Fritz Barnett testified that he has been on the school board since 1991. Both testified that they were unaware of Mrs. Locke's use

of the religious sign language song. The Court finds that both Mr. Barnett and Mr. McCrary gave credible and sincere testimony. The superintendent, Richard Ownby, also testified that he unaware about the use of religious songs by elementary school teachers. The Court finds that Mr. Ownby's testimony likewise was credible and sincere and that, as a general matter, Mr. Ownby was both conscientious and professional in responding to parental concerns.

23. The Court finds that the District did not have a custom, policy, or practice of permitting elementary teachers to use songs such as this and was not deliberately indifferent to allegations of this nature. The Court finds that Mrs. Locke's conduct was not reasonably foreseeable to the District. Therefore, no District policy or practice proximately caused injury to John Doe, Jr.

24. John Doe, Jr., did not testify at trial. There is no evidence that this incident caused him emotional harm or other injury.

25. Susan Doe testified that, at the beginning of the 1994-1995 school year, her son, Butch Doe, brought home a permission slip to sing the "Johnny Appleseed" song before lunch in Mrs. Clayton's class.

26. The words to the "Johnny Appleseed" song are "Oh the Lord is good to me/And so I thank the Lord for giving me the things I need/the sun and the rain and the Appleseed/The Lord is good to me/Amen, Amen, Amen, Amen, Amen, Dig in!" Frankly, the song is one of the Court's childhood favorites and was included in a 1950's Walt Disney cartoon classic, celebrating the achievements

of "Johnny Appleseed." To suggest that this song establishes a religion is simply asinine.

27. Susan Doe did not contact the teacher or the District administration about this song. Neither did she contact any School Board member, although she has often done so in the past. Instead, she reported her complaint to Ms. Debbie Perkey of the ACLU, who called Superintendent Ownby. Mr. Ownby then called Mrs. Clayton's principal, Earl Routh, who instructed Mrs. Clayton not to lead her students in singing the song. Mr. Ownby testified that he was unaware of the use of the Johnny Appleseed song until this complaint was lodged.

28. Mrs. Clayton stopped using the Johnny Appleseed song. Ms. Debbie Perkey testified that she never made any further complaints about Mrs. Clayton's use of this or any similar song.

29. Board members Roney McCrary and Fritz Barnett testified that they were unaware of Mrs. Clayton's use of the Johnny Appleseed song.

30. The District maintains a written Board Policy, Policy EMI, that prohibits the teaching of religion or leading of prayers in the classroom. Mr. Routh testified that, during his seven years as the elementary school principal, he was aware of only two incidents of religious activity by teachers: the "In this Very Room" incident in May 1994 and the "Johnny Appleseed" incident in August, 1994. After the May 1994 incident, Mr. Routh reminded his staff about the Board's policies prohibiting religious practices in the schools. The Court finds that it was not reasonably foreseeable to the District that in August 1994 an elementary school teacher would ask her

students to sing a song with religious content. Nor was the District deliberately indifferent to this incident. No District policy or practice proximately caused injury to Butch Doe.

31. Butch Doe did not testify at trial. There is no evidence that use of the song caused him emotional harm or other injury.

32. Sam Doe did not testify. There is no evidence that his constitutional rights were violated or that he experienced actual injury as a result of any conduct of the District.

33. During the first week of the 1994-1995 school year, Susan Doe's son, Butch Doe, brought home a "Dear Parent" letter from Butch's third grade teacher, Mrs. Beverly Clayton (Plaintiff's Ex. 20). It was in a sealed envelope, addressed to the parent. There was no showing that Butch Doe ever saw, or was aware of the contents of the letter. In the handwritten note, the teacher introduces herself to her students' parents, describes her background, and gives six tips for raising happy and successful children, such as eating dinner together. The 21-sentence note contains one sentence that refers to a poll stating that students with a "strong religious background" are the most successful in school.

34. Susan Doe testified that she was "deeply insulted" by the note and again decided to contact the ACLU. Susan Doe did not call the teacher or the school district, or for that matter, simply throw the letter in the trash. She instead decided to literally make a "federal" case out of it.

35. Ms. Debbie Perkey, ACLU staff attorney, testified that she spoke to Superintendent Ownby after she learned about Mrs. Clayton's note. Ms. Perkey further testified that she never reported any further concerns about this teacher to the District after her call to Mr. Ownby.

36. The Court finds that Susan Doe's claimed reaction to Mrs. Clayton's letter was so unreasonable as to be simply bizarre, in light of the actual content of the letter. The Court finds that no reasonable person could have been insulted by the letter.

37. There is no evidence showing that the letter was authorized by the Board of Trustees or that it was written pursuant to a custom, practice, or policy of the Board.

38. The Court finds that Mrs. Clayton's letter, even if a little heavy handed and offensive to Susan Doe, did not cause Susan Doe actual, compensable harm.

39. Susan Doe also testified about her disapproval of the Johnny Appleseed song and the distribution of Bibles by the Gideons. There is no evidence that Susan Doe herself experienced actual injury as a result of any conduct of the District.

40. Jane Doe testified that, prior to filing this lawsuit, she ran for school board in Santa Fe ISD on two occasions. The Court finds that Jane Doe was active in public affairs in Santa Fe, Texas, and, in her community, is a public figure.

41. Jane Doe testified about the two incidents pertaining to her children Janie Doe and John Doe, Jr., and she testified about her disapproval of the distribution of

religious materials on school campuses, even if other groups have an equal right to distribute non-religious materials. There is no evidence that Jane Doe herself experienced actual injury as a result of any conduct of the District.

42. In 1993 and 1994, the Gideons requested permission to distribute Bibles at the intermediate school and the high school. During the school years in question, Board Policy GKA (Defendant's Ex. 9) permitted outside groups to distribute literature on a non-discriminatory basis.

43. The District historically has allowed a variety of groups to distribute literature, including the Gideons, DARE, the armed forces, and youth athletic groups.

44. Debbie Perkey testified that she was unaware of any outside group requesting and being denied permission to distribute literature to students. Notwithstanding, the Court finds that the Gideons were given preferential treatment over non-religious groups in the distribution of materials on campus, although the preference has now ceased.

45. In November 1993, the Ministerial Alliance presented a live-action, self-esteem-building program called "America, You're too Young to Die" to junior and senior high students who chose to attend. The program was presented during the school day. Mr. Ownby edited and deleted religious references from the script.

46. Ms. Debbie Perkey attended the program during the school day. She testified that the religious content was removed and that she reported no concerns about the

daytime program to the administration after viewing the edited program.

47. The Ministerial Alliance presented an unedited version of "America" at night in November 1993. The Ministerial Alliance paid a rental fee to the District. (Defendant's Ex. 32.) The evening version had religious content.

48. During the school years in question, the District routinely allowed a wide variety of groups to rent its facilities on a non-discriminatory basis. (Defendant's Exhibit 22.)

49. Board Policy GKD (Defendant's Ex. 6) permits community groups to rent District facilities.

50. None of the Plaintiffs testified that the daytime or nighttime presentations caused them emotional distress or any other actual harm.

51. None of the Plaintiffs testified that they experienced any emotional distress or other actual harm as a result of the holding of a baccalaureate at Santa Fe ISD either before or after commencement of this litigation.

52. The evidence at trial established that the District has historically waived rental fees for the use of school facilities for a variety of secular student-related events.

53. There is evidence that the District historically promoted or otherwise encouraged religious clubs, and the District gave preference to religious clubs in comparison to other student clubs. However, the practice has now ceased.

54. No Plaintiff testified that he or she had been harmed by the existence of any religious clubs.

55. Janie Doe testified that she is studying for the Advanced Placement English test and that four books of the Bible were recommended reading for test preparation. Janie Doe testified that alternative assignments are available for those who did not want to read the Bible.

56. Plaintiffs' pleadings do not encompass any complaint about reading assignments.

57. The Court takes judicial notice that the Bible is an extremely important work of history and literature, and indeed a cornerstone of Western philosophy, art and culture regardless of its religious content.

58. The Court finds that a high school senior of Miss Doe's age and intelligence can appreciate the importance of the Bible outside of its religious context.

59. Janie Doe did not contend in any way that the school's suggestion that she read four books of the Bible caused her actual harm, such as emotional distress or anguish.

60. The Court finds that no Plaintiff has suffered a compensable injury because of any actions of the District.

CONCLUSIONS OF LAW

1. Imputed liability is prohibited under 42 U.S.C. § 1983. *See Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 120-21, 112 S.Ct. 1061 (1992). To prevail in an action against a governmental entity, a Section 1983 plaintiff

must show an unconstitutional "policy" or "custom" executed by the governmental entity's final policy-making authority. *Id.* Isolated violations of law by the entity's employee do not constitute a custom or policy. *See Bennett v. City of Slidell*, 728 F.2d 762, 768 (5th Cir. 1984), *cert. denied*, 472 U.S. 1016, 105 S.Ct. 3476, L.Ed 2d 612 (1985). In this case, the Plaintiffs' allegations of constitutional violations by school employees represent, at most, isolated occurrences and are insufficient as a matter of law to constitute a custom or policy under 42 U.S.C. § 1983.

2. Moreover, proof of an unlawful custom or policy is insufficient by itself to support a claim for damages. The Section 1983 plaintiff must establish that the custom or policy manifests "deliberate indifference" to whether students' constitutional rights are violated. *Gonzalez v. Ysleta Indep. School Dist.*, 996 F.2d 739, 759 (5th Cir. 1993); *Baker v. Putnal*, 75 F.3d 190 (5th Cir. 1996). The evidence in this case shows that the District responded appropriately – and was not deliberately indifferent – to allegations of religious activities by school employees.

3. However, even if the Plaintiffs could prove the above essential elements, the fatal flaw in their claim for damages is their failure to establish proximate cause. A plaintiff must show an "affirmative link" between the alleged "policy" and the claimed constitutional injury. *Oklahoma v. Tuttle*, 471 U.S. 808, 823 (1989). The causation standard in a Section 1983 action is proximate cause, which includes components of cause in fact and foreseeability. *Gonzalez*, 966 F.2d at 753 and 761 n. 13; *Reimer v. Smith*, 663 F.2d 1316, 1322 (5th Cir. 1981). The Plaintiffs failed to establish by a preponderance of the evidence that any specific custom or policy of the District was the

proximate cause of any injury they allegedly experienced. The incident that has troubled the Court the most – the disparagement of Janie Doe – was not caused by a custom or practice of the District. By no stretch of the imagination may one characterize the conduct of her teacher as reasonably foreseeable. Indeed, it was so vindictive, yet so out of character, that the Court has to wonder if it were the product of some transient mental aberration. The Plaintiffs were obligated to identify a particular type of violation and then to prove that an injury resulted from the particular violation. They failed to meet their burden of proof by a preponderance of the evidence.

4. The testimony of the adult Plaintiffs shows that the real purpose of their request for damages is to seek compensation based on the abstract value or importance of the infringed constitutional right. As a matter of law, damages may not be awarded for this purpose. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 310 (1986). In an action under 42 U.S.C. § 1983, to obtain damages, a plaintiff must show with specificity the actual harm caused by the constitutional violation. *Carey v. Piphus*, 435 U.S. 247, 255-56, 264 (1978). Nominal damages of one dollar are awarded when the plaintiff proves a violation but is unable to show actual damages. *Id.* at 266-67.

5. Even if the Plaintiffs could establish the required elements of a Section 1983 damages claim, a claimant's testimony, by itself, is insufficient to establish emotional distress in a civil rights case. *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 938 (1996). The testimony of the Plaintiffs was conclusory, uncorroborated, and described no specific discernible injuries. Therefore, it was insufficient

as a matter of law to establish emotional distress or other compensable injury. Under the governing law, none of the Plaintiffs are entitled to damages.

6. Moreover, an essential element of a Section 1983 claim for damages is that the injuries were caused by a person "acting under color of state law." *Robertson v. City of Plano*, 70 F.3d 21, 23 (5th Cir. 1995). Accordingly, Plaintiffs may not recover any damages for having endured rude remarks or offensive comments from members of the community or classmates.

7. Likewise, the law does not afford a remedy of money damages for exposure to ideas, songs, prayers, or critical viewpoints such as those at issue in this lawsuit. *See, e.g., Warner v. Orange County Dept. of Probation*, 95 F. 3d 202 (2d Cir. 1996). Even if such activities were done by the District in violation of the Establishment Clause, they are not the type of activities that cause compensable injuries.

8. Accordingly, the Court concludes that the Plaintiffs have failed to establish their claims against the District under Section 1983. Moreover, even if Plaintiffs had established such claims, they failed to come forward with evidence of any compensable injuries. Therefore, the Court finds that the Plaintiffs should take nothing of and from the Defendant School District by way of their action, and that the District is entitled to judgment in its favor on all claims.

9. To the extent that any of the foregoing Findings of Fact constitute Conclusions of Law, they are adopted as such. To the extent that any Conclusions of Law constitute Findings of Fact, they are adopted as such.

IT IS SO ORDERED.

DONE at Galveston, Texas, this the 13th day of December, 1996.

SAMUEL B. KENT
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JANE DOE, ET AL	§	CIVIL ACTION NO. G-95-176
VS.	§	
SANTA FE INDEPENDENT SCHOOL DISTRICT	§	

FINAL JUDGMENT

(Entered Dec. 13, 1996)

For the reasons set out in the Court's Findings of Fact, Conclusions of Law and Order Denying Attorneys' Fees, filed this date, herein, it is

ORDERED, ADJUDGED and **DECREED** that Plaintiffs take nothing of and from Defendant, by virtue of any claims asserted whatsoever herein. Likewise, Plaintiffs are awarded no attorney's fees, as regards the prosecution of any claims asserted herein. Each party shall bear his, her or its own taxable costs and expenses incurred to date.

ANY RELIEF NOT EXPRESSLY GRANTED HEREIN IS DENIED. THIS IS A FINAL JUDGMENT.

DONE at Galveston, Texas, this the 13th day of December, 1996.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES
DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JANE DOE, ET AL.	§	
VS.	§	CIVIL ACTION NO. G-95-176
SANTA FE INDEPENDENT SCHOOL DISTRICT, ET AL.	§	

ORDER OF SUMMARY JUDGMENT ON LIABILITY ISSUES

Plaintiffs commenced this action pursuant to section 1983 of title 42 of the United States Code, alleging various violations of the First Amendment prohibition against governmental establishment of religion by the Santa Fe Independent School District ("School District"). The underlying facts of this action are not in dispute; indeed, throughout the numerous procedural nuances encountered thus far in the litigation, Defendants have not contested – and, by changing their policies in response to the filing of this action, have manifested their acquiescence in – the relevant factual averments of Plaintiffs.[1] Summary

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[1] The Court now accepts the relevant factual averments of Plaintiffs for summary judgment purposes. Should any of the parties wish to dispute one or more of the facts upon which this Order relies, evidence suggesting the contrary may be presented at trial with the express understanding that the Court will not, for any reason, permit either side additional time in the presentation of its case at trial. *See infra* part VI. Failure to

judgment is therefore appropriate on all liability issues and on Plaintiffs' request for injunctive relief. *See* Fed. R. Civ. P. 56(c) (stating that summary judgment is appropriate if no genuine issues of material fact exist and only issues of law are present); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (noting that summary judgment may be entered on the Court's own motion if the record has been adequately developed). Upon careful consideration of the relevant facts and applicable law, the Court now **GRANTS** summary judgment in favor of Plaintiffs as to liability for the incidents occurring pursuant to the past policies of the School District and **GRANTS** summary judgment against Plaintiffs on their request for injunctive relief curbing the current policies of the School District.

I. Background

Two sets of School District policies are at issue. One set of policies, which was in place at the moment Plaintiffs commenced this action, are those policies pursuant to which the specific incidents forming the basis of Plaintiffs' claims occurred.[2] The other set of policies, which

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contest the facts pertaining to liability at trial shall be construed by the Court as a knowing and binding waiver of any right to challenge such facts.

[2] These incidents occurred amidst the School District's repeated tolerance of similar activities and oftentimes with the awareness and explicit approval of the School District. These incidents therefore reflect the actual policies of the School District at that time, irrespective of any applicable written policies which may have been in place. *See Monell v. Department of Social Servs. of New York*, 436 U.S. 658, 690-91 (1978)

was adopted through abandonment or amendment of the prior policies, consists of the current policies of the School District pertaining to the kinds of activity challenged by Plaintiffs.

As stated in the Complaint, Plaintiffs' claims are based specifically upon the following incidents occurring under the former policies of the School District: (1) distinctively Christian prayer, containing specific and repeated references to Jesus Christ, has continually been infused into graduation ceremonies; (2) the public address system of at least one school has regularly been used for delivering prayers prior to each football game and baseball game, for which the attendance of cheerleaders and band members is required; (3) a clergy member, who has been chosen exclusively by the School District, has conducted a religious baccalaureate on school property, resulting in utility and maintenance expenses to the school; (4) the Gideons, at the invitation and with the authorization of the School Board, periodically distributed Bibles to students as they exited school[3]; (5) a teacher demeaned a student's religion in the presence of other students, who were thereby inspired to

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(recognizing that a "custom" of an entity need not be expressed as a formal or written policy to give rise to liability under section 1983); *see also Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406 (5th Cir. 1995) (holding that the actions of school employees are representative of school district policies).

[3] Such a practice appears to violate the School District's own written policy prohibiting the distribution of Bibles, but, nonetheless, the School District in fact adhered to a contrary policy of permitting the Gideons to engage in the proscribed conduct.

make similarly disparaging remarks of their own; (6) another teacher taught students sign language through use of a religious song while forcing an objecting student to remain unattended outside the classroom, and, upon discontinuation of this practice, the teacher made the announcement to the class while staring directly at the student who objected; (7) yet another teacher circulated a flier to parents/guardians of students which advised that "[s]tudents with strong religious background [sic] are the most likely to succeed in school" and also circulated a song which praises "the Lord"; (8) a flier soliciting membership in a religious group, which meets during school hours, was distributed generally to the student body; and (9) an edited version of a production containing some religious content was performed during normal school hours on school grounds, and an unedited version of the same production containing even more substantial and extensive religious content was performed after school hours on property rented from the school by a private religious organization.[4] At least one Plaintiff was personally involved in, or directly affected by, each of these incidents. Plaintiffs do not base any claims on any other activities attributable to the School Board.

Most of the policies leading to the incidents referenced in the Complaint have been abandoned since commencement of this action. In particular, no Bibles have

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[4] The current record does not clearly indicate which portions of the production were omitted from the edited version. Significant religious portions, however, certainly constituted part of the edited version as well as the unedited version.

been distributed to students, no teacher has made disparaging remarks concerning the religious beliefs of any student, no religious songs have been taught to students, religious promotions or fliers advocating participation in specified religious events or organizations have not been circulated by teachers,[5] and no religious presentations have been performed on school grounds. In addition, the policies pertaining to those incidents which have continued to occur in some fashion have been amended significantly: students now choose, by secret ballot held outside of normal school hours, whether an invocation and benediction is performed at graduation by a student volunteer, who is also selected by secret ballot[6]; students now choose, in the same manner, whether a student delivers a "message" before interscholastic sporting events[7]; and now local clergy may rent property from the school to conduct a privately sponsored baccalaureate outside normal school hours. No other current policies of the School District are at issue.

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[5] The religious organization previously promoted by a teacher is not even included in the most recent "Santa Fe High School Organization Handbook."

[6] The current policy on invocations and benedictions at graduation ceremonies also contains a provision for a new policy to become effective automatically if a court order prevents continued implementation of the current policy. The new policy would be substantively identical to the current policy, except for a requirement that the invocation and benediction must be nonsectarian and nonproselytizing.

[7] The current policy on pre-game messages also contains a provision substantively identical to the one described in the preceding footnote. *See supra* note 6.

II. Meaning of the Establishment Clause

The Establishment Clause of the First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion. . . ." U.S. Const. amend. I, cl. 1. At its heart, the Establishment Clause prohibits federal or state governmental entities from manifesting a preference for particular religious sects or for religion in general. *See, e.g., McCollum v. Board of Educ. of Sch. Dist. No. 71*, 333 U.S. 203, 211 (1948); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The exact contours of the Establishment Clause, however, have escaped precise definition by the federal judiciary. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 679 (1984); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 405 (5th Cir. 1995) (describing "modern Establishment Clause jurisprudence" as being "rife with confusion").

The United States Court of Appeals for the Fifth Circuit presently directs that analyses of whether governmental action violates the Establishment Clause must proceed under each of the five tests the United States Supreme Court continues to endorse. *Jones v. Clear Creek Indep. Sch. Dist.* (*Jones II*), 977 F.2d 963 (5th Cir. 1992) (identifying the tests devised in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which establishes the first three tests, *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), which establishes the fourth test, and, *Lee v. Weisman*, 505 U.S. 577 (1992), which establishes the fifth and final test), *cert. denied*, 508 U.S. 967 (1993); *see also Ingebretsen v. Jackson Public Sch. Dist.*, ___ F.3d ___, 1996 WL 205, at *7 (5th Cir. 1996) (strictly adhering to the approach utilized in *Jones*,

though regrouping and compressing the tests); *Duncanville*, 70 F.3d at 405 (same). First, the action must preeminently "reflect a clearly secular purpose." *E.g., Lee*, 505 U.S. at 585; *Duncanville*, 70 F.3d at 405. Second, the "primary effect" of the action must "neither advance[ ] nor inhibit [ ] religion." *E.g., Lee*, 505 U.S. at 585; *Duncanville*, 70 F.3d at 405. Third, the action must not involve "excessive entanglement with religion." *E.g., Lee*, 505 U.S. at 585; *Duncanville*, 70 F.3d at 405. Fourth, the action must not have "the purpose or effect of endorsing religion." *E.g., Allegheny*, 492 U.S. at 592 (quotation marks omitted); *accord Duncanville*, 70 F.3d at 405. Fifth, and finally, the action must not "coerce anyone to support or participate in" a religious exercise. *E.g., Lee*, 505 U.S. at 587; *accord Duncanville*, 70 F.3d at 405.

III. Liability: Analysis of Former Policies

The Court must analyze the School District's former policies through consideration of the incidents which occurred pursuant to them. *See supra* note 2 & accompanying text (concluding that the actual policies of the School District were defined by the incidents occurring under them). Each of those incidents constituted a violation of the Establishment Clause, as explained below.

The Fifth Circuit comprehensively examined the usage of prayer at graduation ceremonies in *Jones II*. In that case, the Court upheld the school district's graduation policy by heavily relying upon its requirement that any prayer delivered must be nonsectarian and non-proselytizing, especially in connection with the Court's analysis under the second test, which prohibits government

activities having the primary effect of advancing religion, and also in connection with the Court's analysis under the third test, which prohibits excessive governmental entanglement with religion. *Id.* at 967-68 (referentially adopting relevant portions of *Jones v. Clear Creek Indep. Sch. Dist.* (*Jones I*), 930 F.2d 416 (5th Cir. 1991), *vacated*, 505 U.S. 1215 (1992)). The graduation prayers at issue in the instant case, in contrast, are infused with explicit references to Jesus Christ and otherwise appeal to distinctively Christian beliefs. The Court accordingly finds that use of these prayers during graduation ceremonies, considered in light of the overall manner in which they were delivered, violated the Establishment Clause. *See* Order of May 10, 1996, at 4 ("Thus, under explicit Fifth Circuit mandate, which absolutely binds this Court, any invocation or benediction permitted [by the School District] must be nonsectarian and non-proselytizing."); *Jones II*, 977 F.2d at 967-68; *see also Ingebretsen*, 1996 WL 205, at *4 (noting that the holding in *Jones II* depended upon the school district's requirement that prayers be nonsectarian and non-proselytizing); *supra* part II.

The deliverance of a prayer over the school's public address system prior to each football and baseball game coerces student participation in religious events, because student attendance at school is mandatory. Such activity, therefore, fails the fifth test as stated in *Lee*. *See supra* part II. Indeed, the setting in which the test was originally developed was less coercive than the situation at bar, because attendance at the graduation ceremony in *Lee* was strictly optional. *See Lee*, 505 U.S. at 594; *see also Ingebretsen*, 1996 WL 205, at *3. Although students may opt not to become cheerleaders or band members, this is

largely irrelevant to the analysis. *Cf. Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406 (5th Cir. 1995) (upholding an injunction prohibiting school officials from prayer participation during basketball games after noting, among other things, that "members of the basketball team are required to attend" practices and games). The Court accordingly finds that the use of prayers prior to interscholastic sporting events, in the manner conducted, violated the Establishment Clause.

The School District's policy allowing a religious baccalaureate to be held on school property, which resulted in some expense to the school, had the purpose and primary effect of promoting religion. This policy, therefore, failed the first two tests for compliance with the Establishment Clause. *See supra* part II. The School District's selection of a clergy member to conduct the baccalaureate also runs afoul of the third test, which prohibits excessive governmental entanglement with religion. *See id.* The Court accordingly finds that School District's allowance for the baccalaureate in this manner violated the Establishment Clause.

The School District's invitation for the Gideons to distribute Bibles on school grounds,[8] the circulation of

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[8] The record contains no indication that the School District permitted any other group similar access to the students, thereby completely undermining any arguments dependent upon the guarantee of free speech under the First Amendment to the United States Constitution. To the extent that written policies – which Defendants admit were often not followed – purport to establish the contrary, the Court categorically rejects them as not indicative of the School District's actual policies. *Cf. supra* note 3.

fliers to parents/guardians of students advising that "Students with strong religious background [sic] are the most likely to succeed in school," and the circulation of fliers soliciting membership in a religious group meeting during school hours, each had the primary effect and apparent purpose of advancing religion. As such, all fail, at a minimum, the first and second tests.[9] *See supra* part II. The Court, therefore, finds that each of these activities violated of the Establishment Clause.

The criticism of a student's religion in front of her classmates, and the public embarrassment of a student who objected to the teaching of a religious song, constituted governmental endorsements of religion. Each of these endorsements failed the fourth test, because for each "a reasonable person would view the challenged action as a disapproval of her contrary religious choices." *Jones II*, 977 F.2d at 968; *see also supra* part II. The same is true concerning the performance of the edited version of a religious production during normal school hours on school grounds and the performance of the unedited version held after school on rented property,[10] which

[9] The distribution of Bibles may also have amounted to coercion prohibited under the Establishment Clause, though the Court finds no present need to make this determination. *See, e.g.*, Doe Affidavit (stating that the Gideons routinely forced Bibles upon even unwanting students).

[10] The record contains no evidence that other or nonreligious productions were given similar treatment by the School District, and therefore the First Amendment guarantee of free speech does not come into play in the analysis. The Court expresses no opinion on whether the performance of a religious production held after school hours would have violated the Establishment Clause absent the prior endorsement of the edited version of the production.

carried with it the prior endorsement of the edited version.[11] *See id.* The Court accordingly finds that each and all of these occurrences constituted violations of the Establishment Clause.

In sum, each of the incidents forming the basis of Plaintiffs' claims constituted a violation of the Establishment Clause. Accordingly, the Court, under the parameters described above, *see supra* note 1, **GRANTS** summary judgment in favor of Plaintiffs on all liability issues.

IV. Injunctive Relief: Analysis of Current Policies

The Court must determine whether the School District's current policies comport with the Establishment Clause to assess whether injunctive relief is appropriate. As noted earlier, most of the policies at issue have been wholly abandoned by the School District since commencement of this action. *See supra* part I. The Court, therefore, only needs to consider the current policies on invocations and benedictions at graduation ceremonies, baccalaureate services, and pre-game "messages" before football and baseball games. *See supra* part I.

The School District's current policies on invocations and benedictions at graduation and on pre-game prayer for football and baseball games are closely modelled after the policies upheld in *Jones II*, except for the crucial distinction that the School District's current policies do

[11] Those attending the performance of the unedited version likely knew of the performance of the edited version during school hours.

not require that any prayers delivered must be nonsectarian and non-proselytizing. *See Jones II*, 977 F.2d at 964 (analyzing a policy permitting "student volunteers to deliver nonsectarian, non-proselytizing invocations at the graduation ceremonies"); *id.* at 966-972 (emphasizing the importance of a requirement that prayers be nonsectarian and non-proselytizing). As they currently stand, therefore, these current policies of the School District cannot survive scrutiny under *Jones II*. *See* Order of August 17, 1995, at 2 (holding that pre-game prayers must be nonsectarian and non-proselytizing under the mandates of *Jones II*); *Ingebretsen*, 1996 WL 205, at *4 ("We decline . . . to reconsider our holding in *Jones II* which allows students to solemnize their graduation ceremonies with a student-initiated, non-proselytizing, and nonsectarian prayer given by a student."); *see also Duncanville*, 70 F.3d at 406 (discussing the holding of *Jones II*). Nonetheless, injunctive relief cannot appropriately be awarded in the instant case on this ground, because the School District's current policies unambiguously provide that new policies, which correct for the fatal deficiencies by including nonsectarian and non-proselytizing requirements, automatically become effective upon the issuance of an order declaring the current policies invalid. Accordingly, as the School District is herein Ordered to effectuate those new policies, injunctive relief is not needed to ensure the School District's compliance with the Establishment Clause.[12]

[12] The Court reaches this conclusion against the backdrop of the School District's recent efforts to bring their policies into conformity with the mandates of the Establishment Clause and the lack of any indication that sectarian or proselytizing prayers have actually been delivered under the current policies on graduation ceremonies and pre-game messages.

The current policy on baccalaureate services similarly does not warrant the issuance of injunctive relief. In *Jones II*, the Court explicitly condoned "privately-sponsored baccalaureate" services as a legitimate method of "seek[ing] God's recognition" of student achievement. *Jones II*, 97 F.2d at 972; *see also Lee*, 505 U.S. at 629 (Souter, J., concurring) (stating that graduating students may conduct a privately sponsored baccalaureate). Indeed, under the School District's current policy on baccalaureates, each of the five tests is satisfied: the School District's rental of property to those performing the baccalaureate services has the secular purpose and primary effect of attaining a financial profit; the School District's lack of involvement in the organization or conduction of the services insulates it from excessive entanglement with religion; and reasonable people, of any religion, would not perceive the School District as disapproving of their religious choices nor feel coerced into participating in religious activities. Injunctive relief, therefore, would not be appropriate in relation to current policies on baccalaureates held on school property.

In sum, injunctive relief may not appropriately be awarded to curb any of the current policies of the School District at issue. Consequently, the Court **GRANTS** summary judgment against Plaintiffs on any and all of their requests for injunctive relief.[13]

[13] Should Plaintiffs or other interested parties feel that the actual policies of the School District differ from the newly stated policies in such a manner as to be violative of the Establishment Clause, a new cause of action may be commenced in a Court of competent jurisdiction. This Court, however, will not hereinafter reconsider granting injunctive relief in connection with this action.

V. Claims Against the Individual Defendants

Defendants and Plaintiffs both argue at some length in their respective Briefs as to whether the claims asserted against the individual Defendants should be dismissed on the basis that these Defendants have been named strictly in their official capacities. Interestingly enough, the parties appear to agree, as the Court now finds, that no claims have actually been asserted against any individual Defendants. *See, e.g., Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (explaining that actions brought against individuals in their official capacities are, in fact, actions against the entity employing those individuals "in all respects other than name"). The Court accordingly finds the parties' arguments on this issue merely academic and altogether **MOOT**, and the Court hereby directs the parties to focus their attention and energies on the numerous other issues bearing true import to the substantive points in controversy in this case. To be sure, the Court declines to rule on whether the individual Defendant must be dismissed as parties to this action unless and until the parties fairly demonstrate the practical or legal importance of making such a determination.

VI. Conclusion

For the reasons stated above, Summary Judgment is **GRANTED** in favor of Plaintiffs on all issues of liability for incidents occurring pursuant to former policies of the School Board. Summary Judgment is **GRANTED** against Plaintiffs on each and all of their requests for injunctive

relief designed to curb current policies of the School Board.

Limited discovery will be permitted through June 28, 1996, strictly on remaining issues of liability and damages. *See supra* note 1. Each side may take a maximum of seven fact depositions, each of which is limited to two hours, and two expert depositions, each of which is limited to four hours. Medical experts may **NOT** be deposed, though depositions by written questions are permitted. All witness lists and exhibit lists must be submitted no later than July 15, 1996. ***NO EXTENSIONS WILL BE GRANTED.***

A trial on all remaining issues of liability and damages is hereby set for a two-day period on either July 18-19, 1996, or July 25-26, 1996, subject only to the Court's criminal docket. This trial setting is absolutely firm, save for the exception already noted. ***NO CONTINUANCES WILL BE GRANTED.*** Each side will be permitted a maximum of one day to present its case. ***FAILURE OF ANY PARTY TO APPEAR AT THAT TIME THROUGH AN ATTORNEY FULLY KNOWLEDGEABLE OF THE CASE WILL RESULT IN THE STRIKING OF THAT PARTY'S PLEADINGS.*** Shortly after conclusion of this trial, the Court will issue findings of fact and conclusions of law and then set an accelerated schedule for disposing of all remaining issues, most notably the availability and award of attorneys' fees.

The parties are **ORDERED** to bear their own taxable costs and expenses incurred herein to date. The parties are also **ORDERED** to file nothing further on the issues addressed in this Order, in this Court, including motions

to reconsider and the like. Instead, the parties are instructed to seek any further relief to which they feel themselves entitled in the United States Court of Appeals for the Fifth Circuit, as may be appropriate in due course. The parties will, of course, be given an opportunity to brief relevant issues once the above trial has been completed.

IT IS SO ORDERED.

DONE this 3rd day of June 1996, at Galveston, Texas.

SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

APPENDIX F

STUDENT ACTIVITIES: FN (LOCAL)
PRE-GAME CEREMONIES AT FOOTBALL GAMES

The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.

Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

If the District is enjoined by a court order from the enforcement of this policy, then and only then will the following policy automatically become the applicable policy of the school district.

The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.

Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a message or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what statement or invocation to deliver, consistent with the goals and purposes of this policy. Any message and/or invocation delivered by a student must be nonsectarian and nonproselytizing.

APPENDIX G

SANTA FE ISD GRADUATION POLICY

Dated: July 1995

The board has chosen to permit the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be a part of the graduation exercise. If so chosen, the class shall elect by secret ballot, from a list of student volunteers, students to deliver invocations and benedictions for the purpose of solemnizing their graduation ceremonies.

If the District is enjoined by a court order from the enforcement of this policy, then and only then will the following policy automatically become the applicable policy of the school district.

The board has chosen to permit the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be a part of the graduation exercise. If so chosen, the class shall elect by secret ballot, from a list of student volunteers, students to deliver nonsectarian, nonproselytizing invocations and benedictions for the purpose of solemnizing their graduation ceremonies.